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In the Supreme Court of the United States

OCTOBER TERM, 1980

BREAD POLITICAL ACTION COMMITTEE, NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION, LUMBER DEALERS POLITICAL ACTION COMMITTEE, NATIONAL RESTAURANT ASSOCIATION, and the RESTAURATEURS POLITICAL ACTION COMMITTEE,

Appellants,

vs.

THE FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether 2 U.S.C. §441b(b)(4)(D), both facially and as applied, infringes plaintiffs' right of assembly guaranteed by the First Amendment.

2. Whether 2 U.S.C. §441b(b)(4)(D), both facially and as applied, deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment.

3. Whether the failure of the Federal Election Campaign Act Amendments of 1976 to define the term "solicitation" infringes plaintiffs' right of assembly guaranteed by the First Amendment, or deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals, which are as yet unreported, are reproduced as Appendix A, *infra*.

JURISDICTION

The judgment of the court of appeals sustaining the constitutionality of 2 U.S.C. §441b(b)(4)(D) was entered on December 5, 1980. Notice of Appeal to this Court was filed on December 18, 1980. (Appendix B, *infra*). This Court has jurisdiction pursuant to 2 U.S.C. §437h(b). *See Buckley* v. *Valeo*, 424 U.S. 1, 6-13 (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in Appendix C, *infra*.

STATEMENT OF THE CASE

This case raises constitutional challenges to those provisions of the 1976 Amendments to the Federal Election Campaign Act ("the Act")[1] which regulate the solicitation activities of trade associations and their separate segregated funds.[2] Following protracted proceedings in the district court and the court of appeals,[3] the district court made elaborate factual findings regarding, *inter alia*, the impact of the Act on the solicitation activities of the plaintiffs. *See* App. A at 6.

The district court found that §441b(b)(4)(D) (App. C at 52) had "substantially" curtailed plaintiffs' solicitation activities[4] and their ability to engage in other forms of

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[1] 2 U.S.C. §431 *et seq.*

[2] These funds are commonly known as political action committees or PACs.

[3] In December, 1979, the Court of Appeals for the Seventh Circuit held that pursuant to the Act's special judicial review provisions (2 U.S.C. §437h), it and not the district court was the proper forum for initial resolution of the plaintiffs' constitutional challenges. *See* Bread Political Action Committee v. FEC, 591 F.2d 29 (7th Cir. 1979). Accordingly, the court of appeals directed the district court to make findings of fact, prepare a certified record, and identify and certify the constitutional issues raised by the complaint. *Id.* at 36.

[4] An integral part of these solicitation activities prior to the 1976 Amendments, as well as today, involves discussion and espousal of the political and social ideas, opinions, views and beliefs of each plaintiff concerning matters of national concern and of concern to their respective industries. (Finding 196).

protected political speech and association. The court also found that the Act had limited the right of persons with similar or related interests to receive from the plaintiffs communications expressing political ideas, opinions, views and beliefs and to associate themselves with the plaintiffs. (Findings, 188; 194; 197-198; 200).

Prior to the enactment of §(D), the plaintiffs[5] had solicited voluntary contributions from individuals who shared their political and economic goals, without regard to whether the potential contributor was an executive or a stockholder of the corporations which comprised the membership of the particular association. These solicitations were conducted without first having obtained permission from the member corporations. (Finding 195).[6]

With the enactment of §(D) in May 1976, trade associations were compelled to drastically alter their solicitation activities. For under §(D), trade associations were now permitted only to solicit contributions from the stockhold-

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[5] Plaintiffs are the National Restaurant Association ("NRA") and its political action committee, the Restaurateurs' Political Action Committee ("RPAC"); the National Lumber and Building Material Dealers Association ("NLBMDA"), and its political action committee, Lumber Dealers Political Action Committee ("LuDPAC"); and the Bread Political Action Committee ("BreadPAC"), the political action committee of the American Bakers Association. These political action committees are separate segregated funds registered with the Federal Election Commission ("FEC") pursuant to 2 U.S.C. §433.

[6] For example, prior to 1976, BreadPAC and RPAC engaged in extensive solicitation of the approximately 120,000 individuals who, in total, attended the annual conventions of the American Bakers Association and the National Restaurant Association. (App. A at 36-37). (Findings 120-123; 175-177).

ers and the executive and administrative personnel of their corporate members.[7] Moreover, §(D) mandated, as an indispensable precondition to such solicitation, that trade associations first obtain the written permission of the member corporation. Once obtained, that permission is operative only in the calendar year in which it is given; and permission can be given by the member corporation only to one trade association PAC, regardless of how many trade associations to which the particular corporation may belong.[8] Solicitation without compliance with these strictures subjects the solicitor to the criminal and civil sanctions of the Act.

In response to the devitalizing impact of §(D), the plaintiffs filed a complaint against the FEC in the United States District Court for the Northern District of Illinois. The complaint charged that §(D), both facially and as applied: (i) constituted an unconstitutional prior restraint in violation of the First Amendment; (ii) that it abridged the speech and associational rights of the plaintiffs, those executive and administrative personnel and stockholders of the corporations which comprised the trade associations' memberships, and of those persons who shared an "affinity of interest" with plaintiffs; (iii) that it deprived the plaintiffs of due process of law in violation of the Fifth Amendment in that it imposed substantially dissimilar restrictions upon trade association PACs than were im-

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[7] Under the Act, a trade association is prohibited from soliciting any person other than the executive and stockholders of its corporate members and its *own* executive personnel.

[8] The district court found that no comparable restrictions are imposed upon union, corporate or independent PACs. (App. A at 44).

posed on the PACs of unions, membership organizations, and independent PACs; and (iv) that its disavowal of the dictionary definition of the term "solicitation" in favor of the definition, "*anything* which *might* fairly be deemed a request for a contribution," rendered the statute impermissibly vague and overbroad.

Following extensive discovery, the district court certified four constitutional questions to the court of appeals.[9] That court, sitting *en banc* as the court of first impression pursuant to 2 U.S.C. §437h, was sharply divided on the question of whether §(D), both facially and as applied, violated the First Amendment and whether it invidiously discriminated against trade associations in violation of the Due Process Clause of the Fifth Amendment.

Five members of the court held that §(D) neither constituted a prior restraint nor otherwise violated the First Amendment. (App. A at 10). Chief Judge Fairchild and Judges Pell and Bauer vigorously dissented, holding that §(D) was an unconstitutional prior restraint. In addition, they held that even if §(D) did not constitute a prior restraint, it unconstitutionally abridged the speech and associational interests of not only the plaintiffs, but of potential contributors and others with whom the plaintiffs shared an affinity of interest. (App. A at 30-41).

The court of appeals was also divided on the question of whether §(D) deprived the plaintiffs of due process of law. Five members of the court answered this question in

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[9] In addition to the three questions set forth *supra* at I, the district court also certified as question 4, "whether the failure of the . . . Act . . . to define the term "trade association" as used in [§(D)] violates the due process clause of the Fifth Amendment . . . .?" (*See* App. A at 6). We seek review by this Court only of questions 1, 2 and 3. *See supra*, at I.

the negative. (App. A at 16). The minority held that by requiring trade association PACs to obtain written permission as a precondition to soliciting a member corporation's executive and administrative personnel or their stockholders, while imposing no similar restrictions on the solicitation activities of other PACs, §(D) invidiously discriminated against trade association PACs in violation of the Fifth Amendment. (App. A at 41).[10]

[10] In addition, the court unanimously rejected as "frivolous" the FEC's contention that the case did not present a justiciable controversy. (App. A at 7). The court also unanimously reaffirmed its prior holding, *see* 591 F.2d 29, that the plaintiffs had standing to invoke the expedited review provisions of §437h, which the court held embraced claims of unconstitutional application of the Act as well as facial unconstitutionality. (App. A at 8). Finally, the court unanimously answered in the negative the third and fourth certified questions.

THE QUESTIONS ARE SUBSTANTIAL

INTRODUCTION

No less than in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this case is infused with issues which implicate the most fundamental philosophical and constitutional postulates on which this Nation was built and on which it continues to subsist. And, no less than in *Buckley*, this case raises issues which lie at the core of the First Amendment and the Nation's political process.

Despite the deep division in the court of appeals regarding the constitutionality of §(D), the entire court unhesitatingly agreed that "the questions presented . . . are *'substantial'*, ..." (App. A at 9, n.6) (Emphasis supplied). And the FEC, in proceedings in the district court, acknowledged that the case presented "serious constitutional issues" which "go to the heart of the [Federal Election Campaign] Act" and which have "potential far reaching impact on the . . . Act . . . ."[11]

Careful examination of the majority's conclusions leads to the firm conclusion that the questions raised by this case are substantial and that plenary review by this Court is imperative. As we shall demonstrate, the majority's conclusion that §(D) is neither a prior restraint nor otherwise violative of speech and associational rights is contrary to fundamental First Amendment doctrine. In addition it ignores the district court's explicit findings that the statute has substantially curtailed the plaintiff's solicitation activities and affected the speech and associational rights of the plaintiffs and vast numbers of American citizens. By sustaining an Act which has had so pronounced an effect on

[11] *See* "Motion of the [FEC] to Reschedule the Due Date For the Pretrial Materials and the Dates For the Pretrial Status Hearing and Trial" at 2, 5. *Accord* "Motion of the [FEC] For Leave to File In Excess of Twenty Interrogatories" at 3.

the solicitation of political contributions, the majority has eroded the underlying rationale of *Buckley*, which upheld the Act's contribution limitations precisely because they did not adversely affect the ability of candidates and political committees to freely solicit and aggregate political contributions. *See* 424 U.S. at 21-22; 28, n.31.

Of equal import is the majority's holding that although union, corporate and independent PACs are unencumbered by the restraints imposed on trade associations by §(D), that section does not violate the Due Process Clause of the Fifth Amendment. Finally, there are the very significant and substantial questions concerning the vagueness and overbreadth of §(D). These factors alone suffice to warrant plenary consideration by this Court. When to the balance is added the irreconcilable conflict between the Department of Justice and the FEC regarding the permissible reach of the Federal Election Campaign Act, the need for full briefing and argument becomes ineluctable.

It is the FEC's view that the Congress could, consistent with the First Amendment, prohibit the use of corporate (or union) funds to defer the administrative costs of political solicitations. As evidenced by a 1975 opinion letter from Mr. Richard Thornburg, the then Assistant Attorney General of the Criminal Division of the Department of Justice, (App. D at 53), the FEC's view is not shared by the Agency which, for more than sixty years, has been responsible for prosecutions under the Tillman Act, the Federal Corrupt Practices Act and the Federal Election Campaign Act.

That letter was in response to an FEC request for the Department's legal opinion as to whether 18 U.S.C. §610 could constitutionally prohibit the use of corporate and union funds in connection with PAC solicitation if directed to anyone other than shareholders and union members. In that opinion, "which is entitled . . . to great weight,"[12] the Department of Justice stated that the prohibition of

[12] Pipefitters v. United States, 407 U.S. 385, 409 (1972).

corporate "contributions and expenditures"[13] could not, consistent with the First Amendment, be so narrowly limited. Rather a corporate (or union) PAC has the constitutional right to use its own funds to defer the costs of solicitation activities directed toward any person or group having an *affinity of interest* with the corporation (or union). *See* discussion infra at 26.[14] This conflict further demonstrates the necessity for plenary review by this Court.[15]

A.

SECTION (D) CONSTITUTES A PRIOR RESTRAINT ON THE ASSOCIATIONAL FREEDOMS OF PLAINTIFFS AND THE EXECUTIVE AND ADMINISTRATIVE PERSONNEL OF THEIR CORPORATE MEMBERS

By prohibiting solicitations of the executive personnel and the stockholders of corporations comprising the membership of trade associations, without the prior written approval of and permission from the corporate members, §(D) has created a system of prior restraint, indistinguishable in its censoring effect on speech and associational freedoms,[16] from the licensing systems consistently invali-

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[13] *See generally,* United States v. Auto Workers, 352 U.S. 567 (1957). This prohibition, which was formerly codified in 18 U.S.C. §610, is now found in §441b(a) of the Federal Election Campaign Act. *See* App. C at 49.

[14] Although the Thornburg letter antedated §(D) and did not explicitly address the precise questions raised by this case, its underlying rationale applies here *a fortiori.*

[15] While the majority insisted that the question of the constitutionality of §441b(a) and (b)(2) was not before the court (App. A at 24, n.18), it is clear that they *sub-silentio* subscribed to the government's thesis which played a substantial role in their ultimate decision. *See* App. A at 10; 14; 19.

[16] The making of political contributions is a form of associational activity lying at the core of the First Amendment. *See* Buckley v. Valeo, 424 U.S. 1, 65-66 (1976).

dated by this Court.[17]

Under the regime of censorship compelled by §(D), corporations have the unbridled power to determine whether they will allow their stockholders or executives to receive political solicitations from the trade association to which they belong. There are no standards or criteria to guide the censorial decisions of corporations acting in their compelled capacity as instrumentalities of the government; instead "the yea or nay saying by [corporate] officials becomes the standard of the permissible." *Joseph Burstyn* v. *Wilson*, 343 U.S. 495, 532 (1952) (Frankfurter, J., concurring). There is no review either by an administrative or judicial body of the corporate censor's arbitrary determination of whether it will allow a communication between a PAC and one or more of its stockholders or employees, and the potential recipient has no voice in the matter. Finally, no time frame is established within which the corporation must respond to a solicitation request. In fact, the Act does not even require the corporate censor to respond, in which event, the failure to respond is treated as a denial of permission.[18]

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[17] The absence of formal similarity between §(D) and the more commonly encountered forms of restraint is of no moment. For, in testing the constitutionality of a statute which is alleged to violate the doctrine of prior restraint, "the judicial angle of vision . . . is the operation and effect of the statute in substance." Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957). *See also* App. A at 34; Near v. Minnesota, 283 U.S. 697, 709, 711-13, 723 (1931); ACLU v. Jennings, 366 F.Supp. 1041 (D.D.C. 1973) (3 judge court), *dismissed as moot*, 422 U.S. 1030 (1975).

[18] In 1978, only 6% of the American Bakers Association's members expressly refused permission to solicit; 59% failed to respond to the ABA's requests. The result was that the employees and stockholders of 65% of the companies comprising the ABA could not be solicited. The percentage of ABA members not responding to requests to solicit was double that in 1976. (Finding 128; App. A at 33).

Despite the operative effect of §(D) and despite its devitalizing impact on the speech and associational rights of the plaintiffs and vast numbers of American citizens,[10] the majority, without any analysis, held that §(D) was not a prior restraint and that any prior restraining effects were, at best, "tenuous" and "'marginal'". (App. A at 12; 14). This conclusion, *which ignored the district court's contrary findings of fact, see supra* at 2, seems to be predicated upon the following premises: solicitation is a form of "political expression" protected by the First Amendment (App. A at 10); plaintiffs are engaged on a daily basis, unimpeded by § (D), in many other forms of "political expression" protected by the First Amendment; therefore, any restraining effects of § (D) on solicitation are tenuous since the overall quantum of "political expression" is not materially affected. (App. A at 13-14).

The essential flaw in this reasoning is that it overlooks the constitutionally significant fact that solicitation for political contributions is a descrete form of First Amendment activity, separate and distinct from other forms of protected speech and association. In short, while solicitation may be described as a form of "political expression,"

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[10] Since most trade associations are comprised of corporations (App. A at 42-43), the censorial effect of §(D) is staggering. For example, of the 1600 corporate members of the Direct Mail Marketing Association, only 75 gave permission to solicit a total of 90 individuals in 1978 even though the total pool of permissible (employee) solicitees numbered from 100,000 to 300,000. (*See* Deposition of Francis Andrews at 43-46: 140-47). In 1978, RPAC sent almost 16,000 separate requests to NRA member corporations seeking permission to solicit. Only 1,168 members granted permission to solicit approximately 3,000 individuals, 393 of whom actually contributed. (Findings 104-06; App. A at 33). Similarly in 1978, only 35% of the corporations comprising the membership of the American Bakers Association granted permission to Bread PAC to solicit a total of 421 individuals. (See Findings 128; 139; App. A. at 37)

it is not a fungible part of some monolithic whole encompassing all the varied speech and associational activities which fall within the ambit of the First Amendment. By indiscriminantly characterizing the plaintiffs' widely disparate First Amendment activities, including solicitation, as "political expression" and treating them as identical strands in a seamless web, the majority evaded rather than answered the question of whether §(D) constituted a prior restraint on *associational* freedoms. Moreover, as the dissenters demonstrated, the fact that a statute only results in a partial, rather than a total, paralysis of First Amendment activity does not make constitutionally palatable that which is otherwise impermissible. (App. A at 30-31).

Equally unacceptable is the majority's second basis for the conclusion that §(D) is not a prior restraint. By reconstituting their membership to include only individuals rather than corporations, the majority reasoned, trade associations would thus be free to solicit the individual members, unfettered by the prior permission rule of §(D). (App. A at 13). The notion that the unconstitutional can be miraculously transformed into the constitutional by the alchemy of avoidance is contrary to fundamental First Amendment precepts, *see e.g., Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 556 (1975), and accords constitutional dignity to an irrelevance.

Moreover, the majority's conclusion puts out of view a half century of decisions invalidating any apparatus of prior restraint. Beginning with *Near* v. *Minnesota*, 283 U.S. 697 (1931), this Court, in an undeviating series of opinions, has made clear that prior restraints are the most serious and least tolerable infringements on First Amendment rights, and that *any* system of prior restraint is presumptively unconstitutional. (App. A at 34).

In order for the government to meet its exacting burden of proving constitutionality, it must demonstrate: a) that there exists precisely drawn regulations sufficient to obviate the dangers of a censorship system; b) that the case falls within those "exceptional cases" such as obscenity, obstruction to the conduct of a declared war, or incitement to violence; and c) that absent imposition of the restraint, there will surely result direct, immediate and irreparable damage, for the First Amendment will not tolerate prior restraints predicated upon surmise or conjecture that untoward consequences may result.[20]

Section (D) fails to satisfy any of these criteria. There are no procedural safeguards designed to obviate the dangers of a censorship system (App. A at 35), and it is obvious that §(D) does not fall within the limited class of exceptional cases which has sanctioned prior restraints. And, as will be seen, it cannot be demonstrated that §(D) serves any compelling federal interest. *See infra* at 15-21.

Finally the district court's Findings of Fact belie the majority's unsupported conclusion that §(D) has had only a tenuous effect on the plaintiffs. That court found that §(D) has substantially curtailed the solicitation activities of the plaintiffs (Findings 188; 197); has limited their ability "to raise voluntary funds for political purposes; [has] limited their ability to engage in protected political speech and association, and [has] limited the right of persons with similar or related interests to receive from the

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[20] *See* App. A at 34; New York Times v. United States, 403 U.S. 713, 714 (1971); *id.* at 730-31 (White, Stewart, J.J., concurring); *id.* at 725-26 (Brennan, J., concurring); Nebraska Press Association v. Stuart, *supra*, 427 U.S. at 563; Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 553, 559 (1975). This Court's insistence on the presence of procedural safeguards has not been limited to obscenity cases. *See* National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); Procunier v. Martinez, 416 U.S. 396, 417-19 (1974).

Plaintiffs communications expressing political ideas, opinions, views, and beliefs and thereby associate themselves with the Plaintiffs." (App. A at 34; Finding 199).[21]

Under these circumstances, there can be no doubt that the question of whether §(D) is a prior restraint is substantial.

B.

IN ADDITION TO BEING A PRIOR RESTRAINT, SECTION (D) OTHERWISE ABRIDGES THE FIRST AMENDMENT

It is fundamental that First Amendment protections reach beyond prior restraints, and that statutes which affect speech and associational rights may be unconstitutional even though they do not restrain in advance the exercise of those rights. *See, e.g., Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Smith* v. *Daily Mail Publishing Co.*, 442 U.S. 97 (1979). Such statutes, implicating as they do core First Amendment freedoms, are "subject to the most exacting scrutiny." *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976). *Accord Buckley* v. *Valeo*, supra, at 64-65.

In order for such a statute to withstand a First Amendment challenge, it is not enough to show that legislative action is related to the election process. For as *Buckley* itself teaches, that interest cannot be invoked as a talismanic incantation to support any exercise of power. Instead, it must be demonstrated that: the inhibitions on expressional and associational freedoms are *necessary* to further some compelling interest; that absent the curtailment of First Amendment rights, harm will certainly result; that the means employed to achieve the allegedly compelling ends are the least restrictive of associational freedoms; and that

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[21] *See* also App. A at 36 (Section (D) has "dramatically decreased the available pool of potential contributors.").

the benefit gained outweighs the harm to constitutionally protected rights.[22]

Despite the mandatory nature of these criteria, the majority made no attempt to determine whether they were satisfied by §(D). Instead, there is only the *ipse dixit* that §(D) does not violate the First Amendment since any abridgement of associational freedoms is "amply justified" by the "overriding [government] interest" in insuring the integrity of federal elections and the voluntariness of contributions. (App. A at 10; 12; 14).

In what follows, we shall demonstrate that §(D) is unnecessary to the achievement of either of these goals; that on the contrary, §(D) will erode the basis upon which *Buckley* sanctioned the Federal Election Campaign Act's contribution limitations and that it will give rise to the very coercion it purportedly was designed to dispel; that it is subversive of the goal of fostering individual responsibility and preserving the individual's confidence in government; and that it violates the least drastic alternative test. The obvious substantiality of these issues mandates review by this Court.

1.

Section (D) Unnecessarily Burdens First Amendment Freedoms And Subverts the Underlying Rationale of Buckley

The Federal Election Campaign Act and its various Amendments in 1974 and 1976, created an elaborate framework for the regulation of all phases of the election process. The Act has imposed pervasive disclosure and reporting requirements (§434), created substantial civil and criminal sanctions for violations of its provisions (§§ 437g, 441j; *see also* §§437d, 438(a)(9)), and has imposed specific

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[22] *See* App. A. at 35-36; Wooley v. Maynard, 430 U.S. 705, 716-17 (1977); In Re Primus, 436 U.S. 412, 432-34 (1979).

limitations on the amount of money that can be contributed by political committees or individuals (§§441a, and b).

In addition, Congress, in the 1976 Amendments, enacted rigid and explicit "anti-proliferation" provisions "to prevent corporations, labor organizations, or other groups of persons from evading the [Act's] contribution limitations . . . ." (Conference Report No. 94-1057, accompanying S-3065, 4/28/76, at 58). The "anti-proliferation" provisions provide that, for purposes of the contribution limitations, all contributions made by political committees, established, financed, maintained or controlled by any corporation or union shall be considered to have been made by a single political committee. 2 U.S.C. §441a(a)(5). The Act also prohibits contributions through nominees (§441f) and contributions in currency (§441g). *See also* App. A at 40.

In light of this elaborate mechanism, it is idle to suggest that §(D) is necessary or has the capacity to achieve the goal of electoral integrity by insuring compliance with the Act's contribution limitations. Moreover, such a contention cannot be entertained in light of *Buckley* v. *Valeo, supra.* There this Court, in rejecting an almost identical argument, held that the contribution limitations, in conjunction with the disclosure requirements and the Act's criminal penalties, were sufficient safeguards against evasion of the Act's contribution limitations. 424 U.S. at 44-47; 55-56; and *id.* at 236 (Burger, C.J., concurring and dissenting). *See also* App. A at 40). If, prior to the enactment of the anti-proliferation provisions, the Act was adequate to prevent evasion of the contribution limitations, their addition surely makes unnecessary the censorship mandated by §(D).

The majority also failed to recognize that its decision was contrary to the doctrinal underpinnings of *Buckley* itself. In sustaining the Act's contribution limitations, the Court emphasized that the limitations did not affect the ability of candidates and political committees to solicit and

aggregate large sums of money; it merely required them to raise funds from a greater number of persons. *Id.* at 21-22; 28, n.31. (*See also* App. A at 36-37).

Buckley makes clear that its sustaining of the contribution limitations was, in substantial measure, bottomed on the fact that the overall quantum of funds available for political purposes would not be appreciably reduced, and thus there would be no material impact on or undermining of associational freedoms. *Id.* at 29. Indeed, the Court emphasized that while citizens were barred from making large individual contributions, they were free to associate through corporate and labor political action committees, which were then allowed to solicit freely. *Id.* at 28, n. 31.

As the minority persuasively demonstrated, the restrictions imposed by §(D) have eroded the foundation on which rested *Buckley's* imprimatur of the Act's contribution limitations. (App. A at 36). For as a result of §(D), the number of persons each plaintiff may legally solicit has been dramatically curtailed (App. A at 36-37; Finding 188), and the right of citizens to associate through the vehicle of political committees markedly abridged. (Finding 199). And, as a necessary consequence, the corresponding right of the plaintiff political action committees to provide a focal point for political association and to obtain voluntary contributions is diminished. *Id.*

2.

Section (D) Will Heighten Rather Than Reduce Coercion

The majority's second justification for the massive dislocation of First Amendment freedoms wrought by §(D) was the purported necessity of assuring the voluntariness of contributions. (App. A at 10). Careful analysis demonstrates that this unsupported contention cannot withstand scrutiny.

Underlying certain subparagraphs of §441b was Congress' desire to protect employees from the undercurrent of pressure which the Congress perceived to be latent in *direct solicitation* by their *own* corporate employers and union superiors. Indeed, the Conference Report accompanying the 1976 Amendments reveals that Congress perceived in such *direct* solicitation the need for imposing appropriate safeguards to insure against reprisals directed toward employees who do not contribute as much as the solicitor thinks appropriate.[23]

Congressional concern with direct corporate (and union) solicitation of its *own* employees (and members) is readily understandable, for the federal courts and the Congress have long perceived the immediate and direct economic dependence of the employee on his corporate employer or union superiors. (App. A at 37). And they have been sensitive to the possibility that such dependence could have a subtle impact on various decisions which the employee may be called upon to make. *See Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960); *NLRB* v. *Gissel Packing Company*, 395 U.S. 575, 617 (1969).

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[23]To insure that contributions would be freely given, the Congress required that soliciting corporations inform their *own* executive and administrative employees of the political nature of the solicitation and of their right to refuse to contribute without reprisal. *See* 2 U.S.C. §441b(b)(3)(B) and (C); 122 Cong. Rec. 12,199 (daily ed. May 3, 1976) (remarks of Congressman Hayes) (H. R. Rep. on S-3065, Federal Election Campaign Act Amendments of 1976). In addition, to assure the anonymity of those who do not wish to respond or those who wish to respond with a small contribution, a corporation's bi-annual solicitation of *its* rank and file employees can be made only by mail addressed to employees at their residence and must be so designed that the soliciting corporation cannot determine who makes a contribution of $50.00 or less and who does not make any contribution. 2 U.S.C. §441b(b)(4)(B).

However, direct economic dependency of employees on their corporate employers is conspicuously absent in the context of trade association solicitation of a corporation's *stockholders*. It is also absent in the context of solicitation of the administrative and executive employees of an Association's corporate members. (App. A at 37-38). One searches the legislative history of the Act in vain for even a whisper of Congressional concern that trade association solicitation is somehow coercive. This absence of concern stands in stark contrast to Congress' preoccupation with direct corporate and union solicitation of their *own* employees and members.

By requiring corporate consent as a precondition to solicitation, § (D) has unnecessarily interposed the employer between the trade association and the prospective contributor and has thus "heigten[ed] rather than diminish[ed]" any coercive pressures which might exist. (App. A at 38). For "[e]xplicit corporate consent to trade association solicitations subtly, yet directly, would appear to suggest to employees that the employer favors a contribution."[24] (App. A at 38). *Compare NLRB* v. *Virginia Power Company*, 314 U.S. 469, 477 (1941); *NLRB* v. *Gissel Packing Company, supra* 395 U.S. at 617. In short, § (D) will result in the very evil it purportedly was designed to eradicate.

However, even if some minimal degree of coercion were found to inhere in trade association solicitation, § (D) would still be unconstitutional. For the method it has chosen to combat the supposed evil violates the principle that achievement of valid ends cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved. The breadth of legislative

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[24] In one sense, §(D) deprives the potential contributor of any real freedom of choice, for if consent is unilaterally denied by the employer, the employee will have no choice to make.

abridgement must be viewed in the light of less drastic means for achieving the same basic purpose. *See* App. A at 36; *Wooley* v. *Maynard*, 430 U.S. 705, 716-17 (1977).

To satisfy the least drastic alternative test, § (D) would be required to mandate that denial of permission to solicit be predicated upon the prevention of coercion. As presently, written, however, § (D) allows a corporation to deny a trade association's request to solicit for *any reason*. An obviously less drastic and intrusive means of insuring freedom of choice is the establishment of a system of solicitation which either reminds the prospective contributor that he need not contribute, or that insures the anonymity of the contributor, or both. (App. A at 38). As noted earlier, the efficacy of such alternatives has been recognized by the Congress.[25]

Stripped of its pretensions, the majority's thesis is nothing more than paternalism in its worst form. For it assumes, contrary to the most basic tenents of the First Amendment, that our people are incapable of making volitional choices and that they need the paralyzing power of the corporate censor to protect them from a request for a political contribution. But "[t]he First Amendment rejects the 'highly patenalistic' approach of statutes like [§ (D)] which restrict what the people may hear." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 791, n.31 (1976).

The majority also failed to recognize that statutes like the Federal Election Campaign Act were designed "not merely to prevent the subversion of the integrity of the electoral process. [Their] underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States* v. *Auto Workers*, 352 U.S. 567, 575,

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[25] *Compare* Miranda v. Arizona, 384 U.S. 436 (1966).

590 (1957). This theme was echoed in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), which reaffirmed the *Auto Workers'* formulation and, in addition, emphasized that "equally important" was the goal of "[p]reservation of the individual citizen's confidence in government. . . ." *Id.* at 788-89. Achievement of these goals is clearly not furthered by §(D).

C.

SECTION (D) INVIDIOUSLY DISCRIMINATES AGAINST TRADE ASSOCIATIONS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Although the district court found that the restrictions of § (D) apply exclusively to solicitations undertaken by trade associations, that no comparable restraints are imposed on solicitations by independent, corporate and union PACs, and that these restrictions had substantially and adversely affected plaintiffs' solicitation activities (App. A at 44), the majority held that § (D) did not invidiously discriminate against trade associations. In support of this view, the majority argued that not only do incorporated trade associations have the same solicitation rights, *vis-a-vis* their *own* executives and stockholders as are enjoyed by any other corporation, but, in addition, are accorded by § (D) "an additional group of potential solicitees not available to other corporate entities."[26] (App. A at 17-18).

The majority sought to justify the disparity in treatment between trade association and union PACs with the facile conclusion that unions had a different relationship with their members than trade associations had with the executives and stockholders of their member corporations. (App. A at 18). The deficiencies in these arguments are manifold.

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[26](*i.e.* executive and administrative personnel and the stockholders of member corporations).

1.

Incorporated Trade Associations Do Not Enjoy the Same Solicitation Rights As Other Corporate Entities

In *Buckley* this Court held that even when a statute facially appears to be evenhanded, "[t]he appearance of fairness, however, may not reflect political reality." 424 U.S. at 31, n.33. As the minority demonstrated, this case presents precisely such a situation.

Unlike the situation that obtains with corporations organized for profit, most trade associations are not-for-profit corporations, having no stockholders, and exceedingly small executive and administrative staffs. Thus, the typical for-profit corporation, which is outside the scope of § (D), possesses a substantially greater solicitation pool than does an incorporated trade association. It is thus quixotic to suggest that trade associations are not treated differently than other corporate entities merely because the Act, facially, accords both equal solicitation rights regarding their *own* executives and stockholders. (App. A at 41-42).

Nor is the practical inequality in treatment attenuated because § 441b(b)(4)(C) facially accords trade associations the "right" to solicit their *individual* members. Since the membership of trade associations is comprised almost exclusively of corporations (which cannot make contributions (§ 441b) and thus cannot be solicited), the "right" to solicit individual members is illusory. And since most trade associations have few rank and file employees, the "right" to solicit their *own* rank and file is rendered meaningless. (App. A at 42).[27]

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[27] The majority's conclusion about the supposed equality between trade associations, corporations, membership organizations, and labor unions calls to mind Anatole France's insight in Le Lys Rouge; "The law in its majesty *equally* forbids the rich as well as the poor to sleep under bridges, to be in the streets, and to steal bread." (Emphasis supplied).

The untenability of the majority's arguments becomes even more apparent when applied to a federated trade association like plaintiff National Lumber and Building Materials Dealers Association ("NLBMDA") and its political action committee, Lumber Dealers Political Action Committee ("LuDPAC"). NLBMDA is an incorporated trade association to which belong 27 regional incorporated trade associations, which in turn have some 15,000 retail lumber and building materials dealers as members. Simply stated, it is an association of associations.

If NLBMDA's "members" are deemed to be the 27 regional associations, it is obvious that NLBMDA and other federated trade associations not only do not "have broad solicitation rights," (App. A at 17), they have virtually no solicitation rights. Like other incorporated trade associations, federated associations have no stockholders, exceedingly small executive and administrative staffs, and few, if any, rank and file employees. Thus, in practical application, their solicitation rights are not congruent with those of for-profit corporations.

More importantly, the supposed benefit accorded by § (D) to trade associations in the form of an "additional group of potential solicitees," (App. A at 17), is meaningless when considered in the context of federated associations. If NLBMDA's "members" are the 27 regional trade associations, the "additional group of potential solicitees" will not consist of any stockholders since incorporated trade associations are generally not-for-profit and have no stockholders. This leaves only the approximately 40 executive and administrative personnel of the 27 regional associations which belong to NLBMDA. (Finding 61).

If it be true that "[r]ealities must dominate judgment," *Appalachian Coal Co.* v. *United States*, 288 U.S. 344, 360 (1933), the minority properly concluded that the differ-

ences in structure between trade associations and other entities "should give rise to broadened, not restricted solicitation rights for trade associations because the statutory avenues of solicitation available to corporations and membership organizations prove fruitless when applied to incorporated associations." (App. A at 43).

2.

Trade Associations Do Not Have the Same Solicitation Rights As Unions

The invidiously discriminatory nature of § (D) is dramatically illustrated by a comparison of the solicitation rights accorded federated trade associations with those accorded unions having a federated structure. Federated unions, such as the AFL-CIO, are composed of a number of International Unions, which in turn, are composed of numerous Locals. While the organizational structure of federated unions is identical to that of federated trade associations, the former are accorded infinitely greater solicitation rights.

For example, the AFL-CIO's PAC can solicit all individual members of all the Locals comprising all of the Internationals with unlimited frequency and without prior permission from the Internationals or the Locals.[28] These solicitations can be independently conducted regardless of whether the PACs of the International Unions have solicited the individual members of the Locals. *See* 2 C.F.R. §114.5(g). *See also* App. A at 43. Finally, the PACs of the various Internationals are not deemed "affiliated" with the AFL-CIO's PAC for purposes of the contribution limitations of the Act. Thus, contributions from the AFL-CIO's PAC are not aggregated with contributions of

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[28]For solicitations purposes, the members of the various Locals are also members of the AFL-CIO. *See* 2 C.F.R. §114.1(e) and App. A at 43.

the PACs of the International Unions. *See* 2 C.F.R. §110.3(a)(1)(ii).

The treatment accorded federated trade associations by the Act differs drastically. The national association cannot freely solicit the executive and administrative personnel of the corporations comprising the membership of the regional associations which belong to the national association. It must either conduct a joint solicitation with its regional "member" association or have delegated to it those "members'" solicitation rights. (App. A at 43). Regardless of the alternative chosen by the national association, there can be no solicitation without the prior written permission of the regional associations' corporate members and without compliance with the other restrictions of § (D). Perhaps the most glaring disparity in treatment is that, unlike the situation which obtains with federated unions, a federated trade association's regional 'member"-associations are deemed to be affiliated with the national association for purposes of the Act's contribution limitations. *See* 2 U.S.C. §441(a)(5); 2 C.F.R. 110.3 (a)(1)(ii)(D).

The avowed purpose of the disparate treatment between union and trade association PACs is to limit the latters' fundraising potential.[29] Such a purpose cannot survive constitutional scrutiny, for the First Amendment condemns attempts to "[e]qualize the relative ability of individuals and groups to influence the outcome of elections. . . ." The concept "that government may restrict the speech [or, *a fortiori*, the right of association] of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley* v. *Valeo, supra*, 424 U.S. at 48-49.

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[29]In Advisory Opinion 1978-17, the FEC stated that "[b]y requiring advance solicitation approval, and limiting approval by corporate members of a trade association to one trade association per year, the fundraising potential of the trade association is limited."

The exacting analysis required by the Due Process Clause of the Fifth Amendment leads to the same conclusion as the First Amendment analysis: there is absent any compelling interest warranting the invidiousness of § (D), and the mechanism chosen by that section to achieve its goals are the antithesis of the least restrictive means, closely tailored to avoid unnecessary abridgement of First Amendment freedoms.[30] Consequently, § (D) is violative of the Due Process Clause.

3.

Trade Associations Have the Constitutional Right To Solicit Contributions From Those Having An Affinity of Interest With Them

The majority sought support for these conclusions in the nature of the relationship which was thought to exist between trade associations and the stockholders and the executive staffs of their member corporations. Unlike a union, which "represents" its members, a trade association, according to the majority, does not "represent" the stockholders and executives of its corporate members. Hence, the majority concluded, there is absent the commonality or affinity of interest which characterizes a union's relationship with its members. It was this supposed absence of shared purpose which the majority thought warranted the differences in treatment accorded trade association PACs by §(D). (App. A at 19).

The majority's *a priori* determination that only unions and their members and corporations and their executives and stockholders have a commonality of interest is not

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[30]The criteria employed in Fifth Amendment Due Process [Equal Protection] analysis is the same as that employed in First Amendment cases. *See supra* at 14. *See* Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Police Department v. Mosley, 408 U.S. 92, 95 (1972).

only analytically indefensible (See App. A at 33; 38; 44 n.11), but is contrary to the decisions of this Court. From the atmosphere and emanations of *United States* v. *CIO*, 335 U.S. 106 (1943), and *United States* v. *Auto Workers*, 352 U.S. 567 (1957), there emerges with unmistakable clarity a recognition that the First Amendment cannot be canalized within the narrow banks of union membership and corporate ownership or employment. Rather *CIO* and *Auto Workers* teach that the First Amendment accords to corporations and unions the right to communicate not only with their members, stockholders, and employees, but with "customers"[31] and others "affiliated with" them—[32] in short, with those sharing a commonality of interest or purpose.

But "*[t]his reasoning, of course applies as well to solicitations for contributions to voluntary political funds.*" *Pipefitters* v. *United States*, 407 U.S. 385, 431, n.42 (1972) (Emphasis supplied). That is, the same justifications that allow use of corporate (and union) funds to communicate on political matters with those having some appropriately close relationship, likewise allow their use to defer the costs of PAC solicitation. Such expenditures are not directed to "the public at large" and, thus, do not contravene the purposes underlying the Corrupt Practices Act and its successor, the Federal Election Campaign Act.[33]

Since § (D) imposes serious restraints on the speech and associational freedoms of those having an affinity of interest, "the gravest doubt [must] arise . . . as to its constitutionality." *United States* v. *CIO*, *supra*, 335 U.S. at 121.

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[31] United States v. CIO, *supra*, 335 U.S. at 121.

[32] United States v. Auto Workers, *supra*, 352 U.S. at 592. *See also* First National Bank of Boston v. Bellotti, 435 U.S. 765, 808 (1978) (White, J., dissenting).

[33] *See* United States v. Auto Workers, supra, 352 U.S. at 584-85, 587, 589, 592; Thornburg opinion letter, App. D at 53.

D.

SECTION (D) IS VAGUE AND OVERBROAD

For more than a century there has been virtual unanimity of judicial opinion that where the word "solicitation" is used in a statute without being defined, it will be accorded its commonly understood dictionary definition: to importune, entreat, implore, ask, attempt to obtain—in short, to intentionally and specifically request a particular thing. *See e.g., Laurel* v. *Superior Court for Los Angeles County,* 255 Cal. App.2d 292, 63 Cal. Rptr. 114, 118 (1976).

The drafters of the Act, however, have disavowed the dictionary definition in favor of a broad sweeping concept which includes "anything which fairly could be deemed a request for a contribution." (*See* FEC Advisory Opinion 1978-83 CCH Federal Election Campaign Financing Guide, ¶ 5382). A statute of such protean contours is incompatible with the First Amendment, for it "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn from his intention and meaning." This the Constitution will not allow. *Thomas* v. *Collins,* 323 U.S. 516, 535 (1944). *See also Buckley* v. *Valeo, supra,* 424 U.S. at 42-43.

While implicitly acknowledging that this was indeed the definition intended by the Congress (App. A at 21), the court of appeals found the Act neither vague nor overbroad.[34] The court however made no attempt to demonstrate that such a sweeping definition was constitutionally permissible. Instead, it merely adverted to cases sustaining, against vagueness and overbreadth attacks, statutes which have used the term solicitation without explicit definition. (App. A at 20). Since, however, in those

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[34]While joining in this conclusion, Chief Judge Fairchild and Judges Pell and Bauer held that the FEC had construed the term so broadly that there was a chilling effect on protected speech. (App. A at 31, n.3).

cases solicitation was intended to have its customary dictionary definition, they do not support the court's ultimate conclusion.

The court also ignored the recent holding of the District of Columbia Circuit that, as used in the Act, the term "solicitation" is "inherently vague", and "a crucial ambiguity inheres in the word 'solicit'. . . ." *See Martin Tractor* v. *FEC*, 627 F.2d 375 (D.C. Cir.), *cert. denied* ..... U.S. ..... (1980). An examination of the FEC's advisory opinions confirms the validity of the D.C. Circuit's conclusion and demonstrates that the limitless sweep of the definition has made it impossible to ascertain what speech will constitute a solicitation. Additionally, the statutory vagueness and overbreadth have allowed the FEC to assume the role of a super-governmental censor, regulating arbitrarily the political speech and association of citizens in every part of the Nation.

For example, in Advisory Opinion 1979-13, the FEC ruled that an article proposed for inclusion in a corporate PAC's regular newsletter would constitute a solicitation "since it describes [the PAC's] activities and encourages participation in [the PAC] by commending the enthusiasm of employees whose participation in [the PAC] has indicated awareness of the connection between their welfare and government policies toward business." (App. E at 58-63). Thus, the article could not be circulated to anyone (including retired executives) who was not a corporate stockholder or executive and who had not been approved for solicitation by the company as required by § (D). Not only is AO 1979-13 predicated upon an atavistic and discredited conception of the First Amendment,[35]

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[35]Since Mr. Justice Holmes' classic dissent in Gitlow v. New York, 268 U.S. 652, 672 (1925), the expression of ideas and opinion is constitutionally protected even if enthusiastically advanced. *See* Buckley v. Valeo, *supra*, 424 U.S. at 43; FEC v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315 (D.D.C. 1979).

but it demonstrates the impossibility of determining in advance of action, what speech will be deemed a "solicitation."

The vagueness and overbreadth of § (D) have allowed the FEC to prohibit, as a "solicitation," an announcement about the mere existence of a fundraising event (AO 1976-27 and 1976-96, CCH Federal Election Campaign Financing Guide ¶¶5213, 5227), and to require that conspicuous signs and other promotional activity to be used at a PAC booth at a convention be displayed and conducted so that only properly authorized people are exposed. (AO 1978-83; AO 1978-17—CCH, *supra*, at ¶¶ 5382, 5307).

The fact that "it was permissible for the [FEC] to come out differently in these and other cases" (App. A at 22) scarcely supports the conclusion that § (D) is neither vague nor overbroad. On the contrary, it is precisely because the statute gives the FEC such arbitrary latitude that it must be declared unconstitutional.

CONCLUSION

Probable jurisdiction should be noted and the case set down for plenary briefing and argument.

Respectfully submitted,

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Center, Inc.

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1146

BREAD POLITICAL ACTION COMMITTEE, et al.,

Plaintiffs,

v.

THE FEDERAL ELECTION COMMISSION, et al.,

Defendants.

Proceeding on Order Certifying Constitutional Questions by the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77-C-947—Prentice H. Marshall, *Judge.*

Argued En Banc June 16, 1980—Decided December 5, 1980

Before FAIRCHILD, *Chief Judge,* SWYGERT, CUMMINGS, PELL, SPRECHER, BAUER, WOOD and CUDAHY, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In this action, we are presented with four questions concerning the constitutionality of 2 U.S.C. § 441b(b)(4)(D), a provision of the Federal Election Campaign Act ("Act") (2 U.S.C. §§ 431 *et seq.*).[1]

[1] Throughout this opinion we will refer to various sections of the Act by their numbers in Title 2 U.S.C. rather than by their statutory numbers.

The questions come to us on certification from the district court pursuant to 2 U.S.C. § 437h.

I. *Introduction*

In March 1977, plaintiffs brought this suit under 2 U.S.C. § 437h[2] seeking a declaration that Section 441b(b)(4)(D) is unconstitutional and asking the district court to grant a permanent injunction against enforcement thereof. Plaintiffs are the National Restaurant Association and the National Lumber and Building Material Dealers Association, both incorporated trade associations, and the Bread Political Action Committee, the Restaurateurs Political Action Committee and the Lumber Political Action Committees. The three plaintiff political action committees were organized respectively by the American Bakers Association, the National Restaurant Association and the National Lumber and Building Material Dealers as separate

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[2] Section 437h provides:

"(a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

"(b) Notwithstanding any provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

"(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section."

segregated political action funds and were registered with the Federal Election Commission pursuant to 2 U.S.C. § 433. Plaintiffs named as defendants the Federal Election Commission ("Commission"), its eight members and, because he is empowered to take appropriate action on the Commission's referrals of apparent statutory violations, the Attorney General of the United States (Plaintiffs' App. 17).

The challenged provision is one of the 1976 permissive exceptions to Section 441b(a) of the Act, which prohibits contributions or expenditures by "any corporation whatever" or "any labor organization" in connection with a federal election. But an exclusion, added by the amendment to the Act in 1972 and now contained in Section 441b (b)(2)(C), allows corporations and labor organizations to use general treasury funds for "the establishment, administration, and solicitation of contributions to a separate segregated fund[3] to be utilized for political purposes" by the parent organization. These segregated funds may be used to make contributions to candidates in federal elections subject only to restrictions imposed elsewhere in the Act and not in issue here.

A segregated political fund and its parent organization are restricted, however, as to whom they may solicit for fund contributions. Section 441b(b)(4)(A)(i) makes it unlawful for a corporation or its segregated political fund

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[3] The Act now provides that separate segregated funds are "political committees." 2 U.S.C. § 431 as amended by Pub. L. No. 96-187 (93 Stat. 1339). As the Supreme Court noted in *Pipefitters* v. *United States*, 407 U.S. 385, the separate segregated funds are not "meaningfully 'separate' from the sponsoring union [or trade association] in any way other than 'segregated' ". 407 U.S. at 426. The separation required by the Act is a separate bank account and a separate ledger. 407 U.S. at 413-417. In short, the separate segregated funds are simply political arms of the parent organizations.

to solicit contributions from anyone other than its stockholders and their families or its executive or administrative personnel and their families, while Section 441b(b)(4)(A)(ii) makes it unlawful for a labor organization or its segregated political fund to solicit contributions from any person other than its members and their families. These prohibitions are in turn subject to three exceptions added in 1976. Paragraph (B) of Section 441b(b)(4) permits corporations to make two annual written solicitations of their rank-and-file employees and their families. See 11 C.F.R. § 111.6(a). Paragraph (B) also permits labor organizations representing corporate unit employees to make two annual written solicitations of the corporate shareholders and all corporate employees, whether members of the union or not. See 11 C.F.R. § 114.6(b). Paragraph (C) permits membership organizations, cooperatives and corporations without capital stock or their segregated political funds to solicit contributions from their members.

The last exception, paragraph (D) of Section 441b(b)(4), is the focus of the present litigation. This provision permits a trade association or its segregated political fund to solicit contributions from the stockholders and executive and administrative personnel of its member corporations and their families provided that such solicitation has been approved by the member corporation and the member corporation has not approved a solicitation by any other trade association for the same calendar year. The full text of Section 441b(b)(4)(D) is as follows:

> "This paragraph [Paragraph (A) of Section 441b(b)(4)] shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the

> extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year."

All of Section 441b is set out in the Appendix hereto.

In September 1977, pursuant to 2 U.S.C. § 437h, plaintiffs filed a motion below for immediate district court certification to us of certain questions they had submitted to that court pertaining to the constitutionality of the foregoing provision. This motion was denied two days thereafter, and on October 7 the district court denied plaintiffs' motion for a preliminary injunction. We granted leave to appeal on December 21, 1977. On appeal, the principal question before us was whether the five plaintiffs had standing to invoke 2 U.S.C. § 437h (set out in note 2 *supra*).

On January 12, 1979, this Court decided that plaintiffs do have standing to invoke Section 437h and thus have all their constitutional challenges certified by the district court for initial review by this Court sitting *en banc*. *Bread Political Action Committee* v. *Federal Election Commission*, 591 F.2d 29. Therefore, the cause was remanded to the district court, which at plaintiffs' request subsequently certified the following four questions[4] to us:

> "1. Whether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, infringes plaintiffs' right of assembly guaranteed by the First Amendment to the Constitution of the United States of America?

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[4] The district court polished plaintiffs' draft questions into their present form (Com'n App. 45a-46a).

"2. Whether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment of the Constitution of the United States?

"3. Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, to define the term 'solicitation' infringes plaintiffs' right of assembly guaranteed by the First Amendment to the Constitution of the United States, or deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States?

"4. Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, to define the term 'trade association,' as used in 2 U.S.C. § 441b(b)(4)(D), violates the due process clause of the Fifth Amendment to the Constitution of the United States?"

At the same time, the court handed down 215 findings of fact drawn from a joint stipulation of facts and the parties' proposed findings (Com'n App. 47a-111a). Their correctness is not before us. Before answering the questions posed, three jurisdictional arguments of the Commission must be addressed.

II. *Standing, Case or Controversy, and Breadth of Certified Questions*

The Commission has reargued that the plaintiffs have no standing under Section 437h. This question was decided adversely to the Commission by a panel of this Court in January 1979 (591 F.2d 29). We decline to overrule that decision and note that the Ninth Circuit has agreed with us by holding that the California Medical Association and its political action committee had sufficient standing to obtain a judicial ruling on constitutional questions certified under Section 437h. *California Medical Association,*

et al. v. *Federal Election Commission, et al.*, ... F.2d ....., ... (9th Cir. No. 79-4426, decided May 23, 1980) slip op. 2, appeal-Supreme Court jurisdiction reserved until hearing on merits, 49 LW 3245.

The Commission also contends, although more obliquely than it did in the district court, that in answering the four certified questions we would be rendering an advisory opinion rather than deciding a case or controversy as required by Article III of the Constitution (Br. 53, 67-68). The district court's exhaustive findings of fact (Com'n App. 47a-111a), uncontroverted by the Commission, are clear proof why this is a live controversy and in no way mooted. The plaintiffs and defendants remain poles apart as to the meaning and constitutionality of Section 441b(b)(4)(D). Until that controversy is resolved, plaintiffs will continue to be threatened by defendants as to the legality of their present and proposed activities. Accordingly, any argument based on a lack of case or controversy required by Article III of the Constitution is frivolous. This same argument was made in the Commission's 1978 brief (at p. 5) and therefore must have been decided (at least *sub silentio*) against the Commission in our previous *Bread Political Action Committee* case; otherwise the panel would not have remanded the cause so that the district court could certify the constitutional questions (591 F.2d at 36). In any event, the question was decided adversely to the Commission in *Buckley* v. *Valeo*, 424 U.S. 1, 12, and in *California Medical Association, supra*.[5]

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[5] Even the concurring and dissenting opinion of Judge Wallace in *California Medical Association, supra*, did not accept the Commission's case or controversy argument See pp. 11-13 of his slip op. Moreover, he expressly disavowed the D.C. Circuit opinions taking that tack, noting that they ignored *Buckley* v. *Valeo*, 424 U.S. 1 at 11-12. See note 11 of his opinion. The panel of this Court

(footnote continued)

The Commission has also submitted that Section 437h must be read narrowly and may only be used to challenge facially unconstitutional provisions of the Act (Br. 9-11). We again disagree. Section 437h empowers federal appellate courts "to construe the constitutionality of any provision of this Act" by declaratory judgment. This provision does not limit certified questions to "appropriate questions" of constitutionality as the Commission urged in 1978 (Br. 9, 10, 13) and again now (Br. 11-12). Rather, Section 437h requires the district courts to certify "all questions of constitutionality of this Act" to the various circuit courts of appeals. The term "appropriate" as used in Section 437h modifies "actions" and not "questions of constitutionality" as the Commission would have it. *Bread Political Action Committee* v. *Federal Election Commis-*

(footnote continued)

that decided the earlier *Bread Political Action Committee* case was also critical of the D.C. Circuit's reasoning in related cases. 591 F.2d at 35 n. 11. The Commission relies here on *Martin Tractor Co.* v. *Federal Election Commission*, ___ F.2d ___ (D.C. Cir. No. 78-2080 and 79-1027, decided May 8, 1980), certiorari denied *sub nom. National Chamber Alliance for Politics* v. *Federal Election Commission*, 49 LW 3332, which was decided a fortnight before the *California Medical Association* case but not brought to the Ninth Circuit's attention. We are not convinced that *Martin Tractor* is contrary to the position we have taken here in that the court there appears to have based its dismissal for lack of case or controversy largely on the easy availability of advisory opinions from the Commission to eliminate or at least focus the questions presented for review while in this case the questions are already clearly focused. But to the extent that *Martin Tractor* is not distinguishable we are, like the Ninth Circuit, in disagreement with the D.C. Circuit.

On October 6, 1980, the Supreme Court ruled that further consideration of the question of its jurisdiction over the *California Medical Association* case is postponed until the hearing of the appeal on the merits (No. 79-1952, October Term 1980). 49 LW 3245.

sion, 591 F.2d 29 (7th Cir. 1979). Therefore, we adhere to our previous decision and the majority opinion in *California Medical Association, supra*, at slip op. 19, in refusing to limit our review to the facial constitutionality of provisions of the Federal Election Campaign Act or, as Judge Wallace would hold (at pp. 4-9 of his concurring and dissenting slip op.), to questions of exceptional importance as to its constitutionality.[6]

III. *Plaintiffs' Right of Assembly Has Not Been Impermissibly Infringed*

The first question certified to us is "[w]hether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, infringes plaintiffs' right of assembly guaranteed by the First Amendment to the Constitution of the United States of America." In support of an affirmative answer to this question, plaintiffs first argue that Section 441b(b)(4)(D) is an impermissible prior restraint (an issue not specifically certified)[7] or, in the alternative, an unjustifiable in-

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[6] *Mott* v. *Federal Election Commission*, 494 F. Supp. 131 (D. D.C. 1980) is distinguishable. In that case, the district court dismissed the complaint of one plaintiff on ripeness grounds and the complaint of the other plaintiffs on the merits because the questions raised were answered by *Buckley* v. *Valeo, supra*. In so doing, it took the position that Section 437h requires certification only of "substantial" constitutional questions, holding that unripe constitutional questions and constitutional questions that had already been decided can be dismissed without certification. Because the questions presented here are "substantial," we need not decide whether Section 437h requires certification of all constitutional questions regardless of their substantiality.

[7] We agree with the dissent herein (p. 29 *infra* and n. 2 of dissent) that we should address the prior restraint issue since plaintiffs raised it below and Judge Marshall at least referred to the First Amendment in his first question addressed to us.

fringement on their associational freedoms. We are unpersuaded by these arguments and answer the first question in the negative.

It is, of course, well established that association and solicitation are forms of political expression protected under the First Amendment, *N.A.A.C.P.* v. *Button*, 371 U.S. 416; *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620. But these activities are not protected absolutely and may be subject to governmental regulation where there is an overriding state interest in such regulation. *Buckley* v. *Valeo*, 424 U.S. 1 (*per curiam*).

The transcedent legislative objective served by the Federal Election Campaign Act is the elimination of corruption and the appearance of corruption in the federal election process. *Id.* The restrictions imposed by Section 441b of the Act on labor organizations and corporations, including incorporated trade associations, are designed to serve both this objective and the additional objective of protecting individuals from economic coercion. *United States* v. *United Automobile Workers*, 352 U.S. 567, 570-584; *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 113.

The challenged provision is, as noted, one of the exceptions to the broad prohibition of Section 441b(a) against contributions and expenditures by corporations and labor organizations in connection with federal elections. Section 441b(a) clearly withstands First Amendment attack. *United States* v. *Boyle*, 482 F.2d 755, 763-765 (D.C. Cir. 1973), certiorari denied, 414 U.S. 1076; *United States* v. *Chestnut*, 533 F.2d 40, 50-51 (2d Cir. 1976). The 1972 exclusion in Section 441b(b)(2)(C) permits the limited use of corporate and union general treasury funds to establish political action committees denominated "separate segre-

gated funds" in the Act. See note 3 *supra*. This exclusion is clearly intended to strike a balance between the objectives served by banning the use of corporate and union funds in federal elections and permitting wholly unrestricted association between the regulated groups and those individuals in a direct relationship with them. 117 Cong. Rec. 43, 379-381 (1971). The 1976 exceptions set forth in paragraphs (A), (B), (C) and (D) of Section 441b(b)(4) simply define that balance.

Corporations, including incorporated trade associations, are allowed unlimited solicitation of their stockholders, if any, and their families and their administrative or executive personnel and their families. (2 U.S.C. § 441b(b)(4)(A); 11 C.F.R. § 114.5(g)(1).) Labor organizations, membership organizations, co-operatives and corporations without capital stock, including trade associations, are permitted unlimited solicitation of their members and, in the case of unions, their families (2 U.S.C. § 441b(b)(4)(A) and (C); 11 C.F.R. §§ 114.5(g)(2) and 114.7(a).) In short, there is no restriction on the number of times a regulated group may solicit contributions to its political action committee from those in direct relationship to it.

In addition, corporations, including incorporated trade associations, are permitted to make two annual written solicitations of their rank-and-file employees. (2 U.S.C. § 441b(b)(4)(B); see also 11 C.F.R. § 114.6(a).) Unions are permitted analogous contacts with employees of a corporation in which the union represents members working for the corporation. (2 U.S.C. § 441b(b)(4)(B); see also 11 C.F.R. § 114.6(b)).

Solicitations beyond those just described are, with one further exception, prohibited altogether by paragraph (A) of Section 441b(b)(4). That exception is the challenged

provision, paragraph (D) of Section 441b(b)(4), which permits trade associations to solicit any number of times the shareholders and executive or administrative personnel (and families thereof) of their member corporations if the member corporation has approved the solicitations and has not approved any other trade association's solicitation for the same calendar year. See 11 C.F.R. § 114.8(c) and (e). It is obvious that paragraph (D) is intended to provide trade associations with a potential pool of solicitees otherwise forbidden them under paragraphs (A), (B), and (C).

Plaintiffs do not challenge the validity of paragraph (A), (B), or (C), and we note that paragraphs (C) and (A)(i) were recently upheld against First Amendment challenges similar to those brought here against paragraph (D). *Federal Election Commission* v. *National Right to Work Committee*, ... F.Supp. ..... (D.D.C. Nos. 77-2175 and 78-0315, decided April 24, 1980). There Judge Parker concluded that "to the extent the statute restricted plaintiffs' ability to solicit, it represents a marginal infringement on these rights and is fully justified by the need to protect the electoral process." Slip op. at 24.[8]

Plaintiffs' complaint is that the additional avenue of solicitation allowed them under paragraph (D) is too limited to withstand constitutional scrutiny. We disagree. Nothing in Section 441b(b)(4)(D) limits the expression or dissemination of political ideas and information either to the individuals described in the Section or to any other

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[8] See also *California Medical Association* v. *Federal Election Commission*, ___ F.2d ___ (9th Cir. No. 79-4426, decided May 23, 1980), appeal-Supreme Court jurisdiction reserved until hearing on merits, 49 LW 3245, in which it was held that Section 441b(b)(2)(C) does not contravene the First or Fifth Amendments.

individual. Indeed, there has been no showing that this provision has had or could have any prior restraining effect whatsoever on the free flow of political information and opinion by trade associations or their political action committees. To the contrary, Judge Marshall's uncontested findings of fact (Com'n App. 47a-111a) establish that plaintiffs are engaged on a daily basis and unimpeded by paragraph (D) in a broad range of First Amendment activities. Nor does Section 441b(b)(4)(D) prohibit, as plaintiffs suggest, trade associations from joining the shareholders and executive or administrative employees of its member corporations to it in common cause. They are free to solicit any individual, including those just described, to join their trade associations.[9] Once an individual joins a trade association, he or she may be solicited for contributions without limitation under Section 441b(b)(4)(C). The political committees are of course free to accept contributions made to them by shareholders and employees of member corporations without solicitation on the trade associations' or their political committees' part.

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[9] The dissent takes the view that this activity is effectively precluded because of the Commission's broad construction of the term "solicitation." (pp. 31-32, *infra*). The Act, however, clearly prohibits the solicitation of contributions to the separate segregated funds, not solicitation of membership in the trade associations themselves. The Commission's Advisory Opinion 1979-13 prohibits neither solicitation of memberships nor solicitation of contributions to separate segregated funds by trade association members. To the contrary, it permits solicitation of members. Plaintiffs' App. 330; CCH Federal Election Campaign Financing Guide ¶ 5403 at 10,419. Moreover, it seems to us that the thrust of the dissent's position is that the vagueness or overbreadth of the term "solicitation" has a "chilling effect" on plaintiffs' efforts to gather like-minded individuals into its fold. Yet the dissent concurs in Part V, which holds that the term is neither vague nor overbroad.

Finally, trade associations and their political committees are free to urge any individual to support or oppose a particular candidate and even to contribute directly to a candidate's campaign fund.

What plaintiffs cannot do is freely solicit contributions from the shareholders and employees of their member corporations for the use of their own political committees. Because there is no limit on the number of trade associations to which a corporation may belong, the restrictions in Section 441b(b)(4)(D) serve to prevent a proliferation of trade associations and solicitations which would in turn undermine the very purpose of the Act's restrictions on the use of corporate treasuries in federal elections. The effect of the dissent's disposition invalidating Section 441b (b)(4)(D) would be, of course, to make any solicitation of its corporate members' shareholders and administrative/executive personnel unlawful because such solicitations are prohibited under Section 441b(b)(4)(A) except as provided in Section 441b(b)(4)(D). To the extent that the corporate approval requirement has a "prior restraining" effect on the solicitations only allowed by virtue of Section 441b(b)(4)(D) itself, we think it both tenuous and amply justified by the necessity of providing a mechanism to prevent the exception from swallowing the whole.[10]

Plaintiffs' reliance on *Village of Schaumburg, supra,* is misplaced. There an ordinance restricting door-to-door and on-street solicitations for charitable contributions was struck down for overbreadth. The Supreme Court explicitly recognized that "[s]oliciting financial support is undoubtedly subject to reasonable regulation," but found the ordinance in question too broadly framed because it pro-

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[10] We of course do not hold that subsection (D) does not have any restraining effect as the dissent infers (at pp. 30-31, *infra*).

hibited legitimate political advocacy as well as the fraudulent solicitation it was intended to prevent. 400 U.S. at 632. In the instant case, the governmental objective of protecting the electoral process is, to begin with, much weightier than guarding against fraudulent solicitations for charity. More importantly, however, the provision here is not overbroad. To the contrary, it is a very narrowly drawn aspect of a statutory scheme carefully designed to balance a compelling governmental interest and jealously guarded First Amendment freedoms. Cf. *California Medical Association* v. *Federal Election Commission, supra,* note 5; *Federal Election Commission* v. *National Right to Work Committee, supra.*

Consolidated Edison Co. v. *Public Service Commission* ..... U.S. ....., 48 LW 4776 (June 20, 1980), and *First National Bank* v. *Bellotti,* 435 U.S. 765, are also unsupportive of plaintiffs' cause. The former did not deal with money solicitations for elections and is inapt. In the latter, the Supreme Court invalidated a Massachusetts criminal statute prohibiting certain business corporations from making contributions or expenditures to influence referenda. Here we are concerned with Congressional opposition to excessive spending in connection with candidate elections. The Supreme Court noted the distinction: "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections • • • simply is not present in a popular vote on a public issue." 435 U.S. at 790.

The cases dealing with the Federal Election Campaign Act are the cases in point. The leading case is, of course, *Buckley* v. *Valeo, supra.* In *Buckley,* the Supreme Court upheld, *inter alia,* ceilings on campaign contributions which clearly have far greater impact on plaintiffs' fund-raising ability than the minor restriction in issue here. Thus in

accord with *Buckley* and the cases noted upholding other provisions of Section 441b, we conclude that Section 441b (b)(4)(D) does not impermissibly infringe plaintiffs' right of assembly.[11] Realistically Congress cannot be expected to draw the perfect law envisioned by the dissent (at p. 38 *infra*), but adequate procedural safeguards against improper sanctions are available through the established Advisory Opinion machinery contained in Section 437f which immunize those persons who obtain favorable opinions from the Commission and also those whose activity is materially indistinguishable.

IV. *Plaintiffs' Right to Liberty Under the Due Process Clause of the Fifth Amendment Has Not Been Violated*

The second question certified to us is "[w]hether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States." We again answer in the negative.

Plaintiffs' argument on this issue is that the equal protection guarantee subsumed in the Fifth Amendment has been violated because corporations and labor unions may under paragraphs (A) and (B) of Section 441b(b)(4) solicit the permissible solicitees without prior approval of

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[11] Both certified questions one and two refer to the constitutionality of Section 441b(b)(4)(D) "facially and as applied." The only "application" we have discovered comes from the Commission's statutory construction expressed in its brief and at oral argument. Since the parties have not separately treated the "as applied" facet, we will refrain from discussing it in any vein except to state that we find no First or Fifth Amendment unconstitutionality in the Commission's construction of the statute, which will presumably be followed when the Commission applies this Section.

anyone while paragraph (D) requires trade associations to obtain prior approval from a member corporation before soliciting the shareholders or executive or administrative employees of that member corporation. This argument is largely premised, however, on a misreading of the statute.

It is simply not correct that plaintiffs are prohibited by paragraph (D), as they claim, from soliciting anyone other than the shareholders or executive or administrative employees of their membership corporations (Plaintiffs' Br. at 88). Both the literal statutory language and the Commission's regulations interpreting the statute indicate clearly that paragraphs (A), (B), (C) and (D) are not parallel provisions, each addressed to a different regulated group. Incorporated trade associations, because they are corporations, have precisely the same solicitation rights under paragraphs (A) and (B) as do other corporations. 11 C.F.R. § 114.8(i)(2). Moreover, trade associations are also membership organizations or corporations without capital stock and are therefore provided precisely the same solicitation rights as they have under paragraph (C). 11 C.F.R. § 114.7(c). Finally, trade associations are provided under paragraph (D) with an additional group of potential solicitees. 11 C.F.R. § 114.8(c).

Federated trade associations also have broad solicitation rights. A federation of trade associations may solicit its own shareholders (if any), employees and members in accordance with the rules just described. A trade association may also delegate its own solicitation rights to a federation (11 C.F.R. § 114.8(g)(1)(i) or conduct a joint solicitation with the federation (11 C.F.R. § 114.8(g)(1)(ii)), thereby allowing the federation to solicit the noncorporate business and individual members of the individual trade association; the shareholders, executive or

administrative personnel and their families of the individual trade association; and the shareholders and executive or administrative personnel and their families of the corporate members (with approval) of the individual trade association. In addition, a federated trade association may, subject to the same rules as those applied to international unions and their constituent locals, solicit the individual and non-corporate members of their regional, state and local affiliates (11 C.F.R. § 114.8(g)(1)) and the shareholders and executive and administrative personnel and their families of corporate members of such affiliates. 11 C.F.R. § 114.8(g)(2). Thus to the extent that trade associations are treated differently from other corporations and other membership organizations, the difference lies in the fact that trade associations are not limited as are the others to soliciting their own shareholders, employees or members.[12]

Furthermore, the somewhat dissimilar treatment of corporations, labor organizations, membership organizations and trade associations under Section 441b(b)(4) follows from the rather obvious facts that each of the different groups has a different structure and a different kind of constituency and that each requires somewhat different regulation to curb abuses the Act was intended to halt. Regulatory distinctions and exceptions tailored to serve a substantial governmental interest, as here, do not violate the Fifth Amendment's equal protection provision. See *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 98-99. It is important to keep in mind that the restrictions in issue here apply only where a trade association employs

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[12] Labor organizations are permitted one solicitation contact outside their membership. This is the rather limited right to solicit by mail twice annually the shareholders and non-member employees of corporations some of whose employees they represent.

corporate funds to undertake its solicitations. The same individuals who organize these political committees are free to establish a political committee independent of, rather than merely segregated from, the corporate treasury and corporate funds and thereby be free to solicit "the world." The reason Congress chose to allow trade associations to solicit the stockholders and executive or administrative employees (and their families) of member corporations (with their approval)[13] is undoubtedly because the member corporations themselves cannot make political contributions *per se* to the trade association's political committee. 2 U.S.C. § 441b(a). At the same time, the restrictions placed on this potential pool of solicitees serves, as we have said earlier, to prevent the exception from swallowing the whole.

Finally, the relationship that obtains between a trade association and the employees of its member corporations differs significantly from that existing between union members and their unions. Individuals join with other individuals in common cause as members of their union, and the union thus becomes their representative organization. A trade association is also a representative, membership organization, but it exists to promote the interests of its corporate and individual members, not the interests of the employees of its corporate members. Because the corporate employees are neither employed by nor represented by the trade associations, any equal protection comparison between the activities available to trade associations with respect to the employees of their corporate members with those available to labor organizations with respect to their

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[13] The record does not show that such approval "is generally refused" as the dissent would speculate (at pp. 42-43 *infra*) or that plaintiffs do not seek to solicit all corporate employees because of lack of commonality of interest (n.10 at p. 44 *infra*).

membership or the empolyers of their membership runs afoul of plaintiffs' failure to demonstrate how trade associations and labor organizations are "similarly situated" parties.[14] Accordingly, we conclude that Section 441b(b)(4)(D) does not deprive plaintiffs of liberty without due process in violation of the Fifth Amendment.[15]

V. *It Is Unnecessary for Section 441b(b)(4)(D) to Define "soliciting contributions"*

The third question certified to us is as follows:

> "Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, to define the term 'solicitation' infringes plaintiffs' right of assembly guaranteed by the First Amendment to the Constitution of the United States or deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States?"

The phrase "soliciting contributions" is not unconstitutionally vague since people "of common intelligence" need not "necessarily guess at its meaning and differ as to its application * * *." *Baggett* v. *Bullitt*, 377 U.S. 360, 367. Statutes and rules using the term "solicit" have been uniformly upheld. *Ohralik* v. *Ohio State Bar Association*.

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[14] Plaintiffs attempt to circumvent this difficulty by suggesting that the appropriate test here is whether all the regulated groups are afforded the same solicitation rights with respect to those sharing a "commonality of interest" with them. Leaving aside the considerable definitional and line-drawing problems that such a test would involve, plaintiffs have failed to demonstrate why a commonality of political interest between shareholders and employees of member corporations and trade association political committees should be assumed simply because the corporations belong to the trade association.

[15] See note 11 *supra*.

436 U.S. 447, 462, 464; *In re Primus*, 436 U.S. 412, 438; *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U.S.793; *Securities and Exchange Commission* v. *May*, 229 F.2d 123 (2d (Cir. 1956); *Sargent* v. *Genesco, Inc.*, 492 F.2d 750 (5th Cir. 1974); *Federal Election Commission* v. *National Right to Work Committee, supra*, slip op. 12. Consequently, plaintiffs do not contend that the absence of a definition of "soliciting contributions" in Section 441b(b)(4)(D) renders Section 441b(b)(4)(D) unconstitutionally vague (Br. 79). Instead, they claim only that the "overbreadth" of this phrase permits the issuance of inconsistent opinions by the Federal Election Commission.

Plaintiffs are particularly critical (Br. 71-75) of Advisory Opinion 1979-13, in which the Commission concluded that a proposed article for inclusion in a separate segregated fund's publication going to employees and retirees was a solicitation within the meaning of the Act

> "since it describes RAYPAC's activities and encourages employees to participate in RAYPAC by commending the enthusiasm of these employees whose participation in RAYPAC has indicated awareness of the connection between their welfare and government policies toward business." (Plaintiffs' App. at 330.)

Since the article could in all fairness be considered by a reasonable person to be a request for a contribution,[16]

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[16] The article quoted the chairman of the corporate political action committee as follows:

> "I was glad to see that Raymond has so many employees who realize that the welfare of us all is tied very closely to government policies and attitudes toward business. RAYPAC is one way we can make the voice of business people in our industry heard in this country. I hope we continued [sic] to have such an enthusiastic group." (Plaintiffs' App. at 329-331.)

the Commission cannot be faulted even if we would decide differently. See note 9 *supra*. Moreover, the Commission stated the newsletter article would not be an improper contribution solicitation if it were sent only to persons that may be solicited under the statute or regulations and told the recipients that their contributions would have to be returned if coming from impermissible sources. Finally, the Commission's opinions are only advisory in nature and not binding upon the party requesting them. 2 U.S.C. § 437f. In contrast, in Advisory Opinion 1979-66, the Commission determined that publication of certain financial information by a separate segregated fund was not a "solicitation" within the meaning of the Act. The information in question merely reported the total sum collected by the Associated General Contractors Political Action Committee and did not commend the enthusiasm of PAC contributors or encourage readers to support that separate segregated fund's activities. Since it was permissible for the Commission to come out differently in these and other cases, the Commission's Advisory Opinions do not demonstrate that the phrase "soliciting contributions" in Section 441b(b)(4)(D) is overbroad and unconstitutionally vague under the First and Fifth Amendments. That being the sole reason given for plaintiffs' attack, the third question must be answered "No."

VI. *It Is Unnecessary to Define "trade association" in Section 441b(b)(4)(D)*

The final constitutional question certified to us is as follows:

> "Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, to define the term 'trade association,' as used in 2 U.S.C. § 441b(b)(4)(D), violates the due process clause of the Fifth Amendment to the Constitution of the United States?"

The only plaintiffs challenging the absence of a statutory definition of "trade association" are plaintiffs National Lumber and Building Material. Dealers Association and its political action committee. They claim that they are unable to ascertain whether they may solicit only the executive and administrative personnel of its 27 incorporated trade association members or also the executive and administrative personnel of the corporate members of its member trade associations.[17] The Commission has ruled that a federation of trade associations like National Lumber and Building Material Dealers Association may also solicit contributions from the executive and administrative employees of its members' corporate members provided that the trade association and federation are "affiliated"; that is, that they are considered one political action committee for the purpose of contribution ceilings. See 11 C.F.R. § 114.8(g)(1) and (2); see also 2 U.S.C. § 441a(a)(5) and Commission Informational Letter, Fed. Elec. Camp. Fin. Guide, CCH ¶6031. If these two plaintiffs are still worried about the propriety of their proposal, an advisory opinion can of course be obtained from the Commission under Section 437f. In any event, this alleged confusion arises because of these plaintiffs' status as a federation of trade associations and a political committee of a federation of trade associations respectively, not from the absence of a statutory definition of "trade association."

"Trade association" like "solicitation," is a frequently used and well understood term. The Commission's regulations reflect the commonly understood meaning of the term.

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[17] Certain corporate retail dealers comprise the members of this Association's 27 corporate trade association members (Plaintiffs' Br. 102).

For example, 11 C.F.R. § 114.8(a), promulgated on April 13, 1976, provides:

> "A trade association is generally a membership organization of persons engaged in a similar or related line of commerce, organized to promote and improve business conditions in that line of commerce and not to engage in a regular business of a kind ordinarily carried on for profit, and no part of the net earnings of which enures to the benefit of any member."

Similarly, 11 C.F.R. § 114.8(g)(1) provides:

> "A federation of trade associations is an organization representing trade associations involved in the same or allied line of commerce."

In view of the plain and ordinary meaning of "trade association" and the Commission's adherence to that meaning, we conclude that the absence of a statutory definition of the term as it is used in Section 441b(b)(4)(D) does not violate the due process clause of the Fifth Amendment.[18]

The cause is remanded for further proceedings consistent with the four answers given herein.

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[18] Plaintiffs have recently called our attention to the statement in *Federal Election Commission* v. *Lance*, 617 F.2d 365, 367 (5th Cir. 1980) that "there is a serious question whether the Federal Corrupt Practices Act is constitutional." Since note 1 of the opinion shows that the court was referring only to Sections 441b(a) and (b)(2) which are not before us, the statement is inapplicable here.

APPENDIX

2 U.S.C. § 441b provides:

§441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, dis-

tribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or separate seggreated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this sub-paragraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from

soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate seggregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policy-making, managerial, professional, or supervisory responsibilities.

PELL, *Circuit Judge*, with whom FAIRCHILD, *Chief Judge*, and BAUER, *Circuit Judge*, join, concurring in part, dissenting in part.

While I concur in parts II, V, and VI of the majority opinion, I am in disagreement with parts III and IV and their negative answers to the district court's certified questions 1 and 2. Accordingly, I respectfully dissent a to parts III and IV of the majority opinion.

As a matter of prefatory observation, I note that a fact of modern day living is that anyone who has a mailing address which has been in existence for a duration of more than a minimal period of time is besieged by a rather steady succession of solicitations to contribute to invariably worthwhile causes. These unsolicited solicitations, despite the merits applicable to the proposed donees are, by virtue of their multiplicity, frequently annoying. Nevertheless, it does not seem to me that potential annoyance should be the occasion for spreading a protective Big Brother cloak of prohibition.

Also at the outset, I note that the question of whether 2 U.S.C. § 441b(b)(4)(D) infringes the plaintiffs' First Amendment right of *speech* was not certified to this court by the district court. It is well established, however, that solicitation implicates a variety of speech interests, *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632, (1980),[1] as well as associational rights protected by the First Amendment. Consequently, it is impossible to extricate that subsection's effect on speech from an analysis of associational interests even assuming

[1] The Court identified three speech interests involved in solicitation: communication of information, dissemination of ideas, and advocacy of causes. *Id.*

arguendo that this court is bound by the precise questions certified.[2]

Prior Restraint

Subection (D)'s requirement that a trade association obtain the prior approval of its corporate member before soliciting the shareholders and executive and administrative personnel of the corporate member is, in my opinion, an invalid prior restraint. The majority holds that subsection (D) does not constitute a prior restraint because it finds no actual prior restraining effect on the free flow of political information, inasumch as the plaintiffs still engage in many First Amendment activites.

It is true, as the majority opinion notes, that the plaintiffs do still undertake various forms of political expression. Yet, the First Amendment does not protect the rights of speech and assembly only when they are entirely abrogated. The United States Supreme Court repeatedly

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[2] In that instant case, the plaintiffs' proposed statement of constitutional questions for certification phrased the first issue more broadly than the district court's final formulation. The plaintiffs would have certified the question as "[w]hether 2 U.S.C. § 441b (b)(4)(D), both facially and as applied, violates the First Amendment." Judge Marshall subsequently narrowed the proposal to reach only subsection (D)'s effect on the right of assembly.

2 U.S.C. § 437h(a) (Supp. 1979) provides that "[t]he district court immediately *shall* certify *all* questions of constitutionality of this Act to the United States courts of appeals for the circuit involved, which shall hear the matter sitting en banc" (emphasis added). It would seem therefore that a district court's failure or refusal so to certify *all* constitutional questions cannot be insulated from appellate review. The majority apparently assumes that this court is not bound by the precise constitutional questions certified because it addresses the prior restraint issue which, it acknowledges, was not specifically certified.

has stressed that total suppression of speech is not necessary to invoke First Amendment protections against otherwise invalid prior restraints. *Consolidated Edison Co.* v. *Public Service Commission*, 100 S.Ct. 2326, 2335, n.10 (1980); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1978); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 556 (1974); *Spence* v. *Washington*, 418 U.S. 405, 411 n.4 (1973) (per curiam). In *Southeastern Promotions, supra*, 420 U.S. at 556, for example, the Court acknowledged that "it does not matter for purposes of this case that the board's decision might not have had the effect of total suppression of the musical ["Hair"] in the community." Likewise, the fact that the plaintiffs in the instant case take advantage of avenues of political expression other than the solicitation of the prohibited groups will not validate an otherwise invalid prior restraint.

The majority opinion seems to conclude that there is no prior restraining effect in part because the plaintiffs are free to solicit anyone to *join* their organizations and, once someone joins, that person can be solicited for contributions as a trade association member an unlimited number of times. That technically is true. The Federal Election Commission (FEC or Commission), however, has so broadly construed the term "solicitation" as to create inhibiting doubt even on the solicitation of memberships.[3]

The Commission's Advisory Opinion 1979-13, for example, prohibits an organization from publishing "an arti-

[3] I am not unmindful that I have concurred in Part V of the majority opinion. I have done so because I do not regard the term "solicitation" as such as being either overbroad or vague, which is not to say that it may not very well achieve a chilling impact by political overextension.

cle in its corporate newsletter which would inform employees of the *activities and existence* of its separate segregated fund," Federal Election Campaign Financing Guide ¶5403 at 10,419 (CCH) (dissenting opinion of Chairmen Aikens and Friedersdorf) (emphasis added), merely because the article "commend[ed] the enthusiasm of employees whose participation . . . has indicated awareness of the connection between their welfare and government policies toward business." *Id.* In that case, the Commission found the proposed article to be an unlawful "solicitation" even though it contained no request for contribusion found the proposed article to be an unlawful "solicitations," coupled with the Federal Election Campaign Act's (FECA or Act) harsh civil and criminal sanctions,[4] has, as a practical matter, substantially inhibited the plaintiffs' ability to communicate with the shareholders and administrative and executive employees of member corporations in their common political cause.

The majority's assertion that trade associations are free to urge any individual to support or oppose a particular candidate does not render subsection (D)'s prohibition any less severe. The United States Supreme Court recognized in *Buckley* v. *Valeo,* 424 U.S. 1, 22 (1976), that money contributions enable "like-minded persons to pool their resources in furtherance of common political goals." Thus, while the organizations can urge anyone to support a particular candidate, their inability to solicit still impingers upon their associational interests. The Court recognized that the right to association "is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Buckley* v. *Valeo, supra,* 424 U.S.

[4] 2 U.S.C. § 437g (Supp. 1979).

at 65-66. Solicitation of member corporations' shareholders and administrative and executive personnel provides a particularly important source of funds for the trade associations since many of their members are corporations which are prohibited by § 441b(a) from contributing.

Finally, the majority's recognition that the plaintiffs can accept contributions from anyone, although they cannot solicit everyone, appears to me to be irelevant. The trade associations' First Amendment interests in speech and association are nonetheless curbed by their inability to solicit those with whom they share an affinity of interest but who do not happen to contribute.

The district court's findings of fact illustrate that, while the plaintiffs can and do engage in some First Amendment activity, the prior restraint set up by subsection (D) has exerted a chilling effect on the exercise of First Amendment rights by the trade associations and the potential recipients of the solicitation.[5] The district court found, for example, that in 1977 the Restaurateurs Political Action Committee (RPAC) requested permission to solicit from 7,509 of the National Restaurant Association's (NRA) corporate members, but received permission from only 1,087. In 1978 only 1,168 members, out of the 15,759 requested, granted permission to solicit. Moreover, during its annual fundraising banquet in 1977, RPAC experienced a loss of members who were willing to sell tickets because of fear of the Act's criminal and civil penalties for violating the Act. Because of these and other difficulties imposed by the Act, the banquet was abandoned in 1978. The court also found that Bread Political Action Committee (BreadPAC) has not been able to receive authorization from the mem-

[5] First Amendment protections extend to the communication, the speaker, and the intended recipients. *Virginia State Bd. of Pharmacy, supra,* 425 U.S. at 657.

ber corporations of the American Bakers Association (ABA) to solicit since 1976. But for the restriction imposed by subsection (D), the Committee would solicit the executive and administrative employees and shareholders of the member corporations. Finally, the district court found that

> [t]he 1976 Amendments to the Act have limited the ability of each of the Plaintiffs to raise voluntary funds for political purposes, have limited each Plaintiff's ability to engage in protected political speech and association, and have limited the right of persons with similar or related interests to receive from the Plaintiffs communications expressing political ideas, opinions, views, and beliefs and thereby associate themselves with the Plaintiffs.

Subsection (D) admittedly does not resemble the typical prior restraint which involves delegation of unlimited discretion to an administrative official. This is a distinction without a difference, however, because "[*a*]*ny* system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (emphasis in original), *quoting Bantam Books, Inc.*, v. *Sullivan*, 372 U.S. 58, 70 (1963). *See, e.g., ACLU* v. *Jennings*, 366 F. Supp. 1041, 1049-52 (D.D.C. 1973), *vacated sub nom., Staats* v. *ACLU*, 422 U.S. 1030 (1975) (FECA provision held to be a prior restraint even though the Court acknowledged that it technically did not resemble a typical licensing system because the Act designated the media, not the government, to act as censor).

A statute subjecting First Amendment freedoms to a prior restraint will be upheld only if it enunciates definite and objective standards to guide the censor's discretion. *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150-

51 (1969). In the present case, the Act wholly fails to establish any standards to harness the member corporations' discretion except that a corporation cannot approve solicitation by more than one trade association per year. Thus, a corporation arbitrarily can deny permission to solicit for any reason whatsoever even if it has not yet granted permission to any other trade association for that year.

A judgment that subsection (D) operates as an invalid prior restraint would not compel the conclusion that Congress cannot regulate trade association solicitation in any manner whatsoever. Rather, the statute fails because it does not set up adequate procedural safeguards. The Supreme Court has recognized that "[i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute." *Freedman* v. *Maryland*, 380 U.S. 51, 56 (1965).

Infringement of First Amendment Freedoms

Even if § 441b(b)(4)(D) were not invalid as a prior restraint, it would nevertheless be unconstitutional for impermissibly infringing the plaintiffs' rights of speech and assembly.[6] While these rights are not absolute, "governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" *Buckley* v. *Valeo*, *supra*, 424 U.S. at 24, *quoting NAACP*

[6] The majority opinion seems to misconceive the effect of my challenge to subsection (D). I merely think the exception provided by this subsection to subsection (A) should not be rendered virtually meaningless by the imposition of the prior consent provision. In sum, I am only challenging the prior consent aspect.

v. *Alabama*, 357 U.S. 449, 460-61 (1958). The Court in *Buckley, supra*, 424 U.S. at 25, ruled that a statute infringing First Amendment rights can only be sustained if (1) the restriction serves a "sufficiently important [governmental] interest," and (2) it "employs means closely drawn to avoid unnecessary abridgment of associational freedoms." A statute infringing First Amendment freedoms will be invalid if less restrictive means of accomplishing the governmental objective are available. *Village of Schaumburg, supra*, 444 U.S. at 637. The Federal Election Campaign Act was enacted primarily to diminish the actuality and appearance of corruption in the federal election process resulting from large financial contributions. *Buckley* v. *Valeo, supra*, 424 U.S. at 25. In *Buckley*, the Court's decision to uphold contribution limitations (while simultaneously striking down expenditure ceilings) was largely premised on the understanding that contribution ceilings would not reduce resources available to both candidates and political committees. It is important to note that *Buckley* predicated the Act's restrictions on trade association solicitation. The Court reasoned:

> Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations. The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons.

424 U.S. at 21-22.

Subsection (D) nonetheless has dramatically decreased the available pool of potential contributors to the plaintiff organizations. The Lumber Dealers Political Action Com-

mittee's (LuDPAC) eight largest federated members informed LuDPAC that, but for the Act's 1976 amendments, they would have supplied LuDPAC with their membership rosters which total over 4,300 retail dealers. RPAC similarly was unable to solicit over 100,000 persons present at each of the NRA's annual 1977, 1978, and 1979 conventions who otherwise would have constituted an available solicitation pool. Bread Political Action Committee's solicitations likewise were limited by subsection (D). In 1975, BreadPAC solicited 1,250 individuals; from January to May 1976, BreadPAC had already solicited 1,904 persons. From May 11, 1976, the effective date of the 1976 amendments, through December 1976, the number of individuals solicited by BreadPAC dropped to 462. In 1977, only 577 persons and in 1978 only 421 persons, were solicited.

The drop in the number of persons available for solicitation was reflected in a dramatic decrease in contributions. BreadPAC's contributions, for example, declined from $40,190 in 1975, to $33,712 in 1976, to $28,000 in 1977 and $29,550 in 1978. The statistics indicate that the premise of *Buckley*, that contribution totals received by candidates and political associations should not be diminished by the Act's restrictions, is subverted by subsection (D).

The majority cites employee freedom from employer economic coercion as one purpose underlying the enactment of subsection (D). While this objective may have motivated Congress, the restrictions imposed on trade associations do not, in fact, serve that goal. The direct employment relationship existing between employer and employee provides an inherently coercive setting for employer solicitation. *Martin Tractor Co.* v. *FEC*, 627 F.2d 375, 387 (D.C. Cir. 1980). Yet, § 441b(b)(4)(B) allows corporate employers to solicit any corporate employee twice yearly.

The Act seeks to limit further employee solicitation by requiring prior corporate approval for solicitation by trade associations. The Government contended that because trade associations represent corporate interests, corporate employees will feel bound to contribute to the associations. In fact, the potential for such coercion logically should be less in the trade association context than in the direct employer/employee relationship because employees do not depend upon the trade associations for their livelihood. Even if some compulsion arguably exists, subsection (D) heightens, rather than diminishes, any such coercion. Explicit corporate consent to trade association solicitation subtly, yet directly, would appear to suggest to employees that the employer favors a contribution.

As well as subverting the very purpose it was intended to serve, subsection (D) imposes a substantial impact upon associational freedoms. The plaintiffs' expert testified that corporate employees share an "affinity of interest" with the trade associations to which their corporate employers belong.

Consequently, subsection (D) is not a narrowly drawn provision which achieves the asserted governmental objective as the First Amendment requires. Other less drastic means could ensure employee freedom from coercion at the hands of trade associations while treading less severely upon invaluable First Amendment rights. The Act could, for example, require trade association solicitations to remind the corporate employees that they need not contribute. The Act could additionally mandate that a system of solicitation be adopted which would guarantee the anonymity of the contributor. Congress applied just such safeguards to a corporation's solicitation of its own employees in preference to an absolute ban.[7]

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[7] 2 U.S.C. §§ 441b(b)(3)(C); 441b(b)(4)(B) (Supp. 1979).

The majority further reasons that because there are no limits on the number of trade associations to which a corporation can belong, subsection (D) prevents a proliferation of trade associations which might allow member corporations to undermine the Act's contribution limitations.[8] The Government argued that this result would flow from the fact that member corporations often are involved in the selection of a trade association's board of directors and that, therefore, a corporation could set up a number of "dummy" trade associations. The FEC contended that corporate members "control" trade associations' boards of directors.

The district court's findings of fact regarding the composition of the boards of directors in the instant case, however, indicate that the danger is overstated. Two directors each of the National Lumber and Building Material Dealers Association are selected by each federated member, the past two national presidents, the Association's officers, and various other persons. The NRA's board of directors, which numbers sixty members, is selected to represent NRA members according to their geographical distribution. Each member of the American Bakers Association is entitled to send one representative to sit on the ABA's governing board which is made up of approximately 350 individuals with another 350 alternates. It is obvious, therefore, that *individual* corporate "control" of any of these trade associations is diluted by the numbers of representatives of different corporations which compose each trade association's board of directors. While the directors

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[8] 2 U.S.C. § 441a(a)(1)(C) prohibits contributions by any person to any political committee (other than those of candidates or national political parties) in excess of $5,000 per year; § 441a(a)(1)(A) forbides any contribution to a political candidate for federal office in excess of $1,000 annually.

undoubtedly share many similar interests, their diversity in terms of factors such as size, product, or location necessarily restricts their potential identity of interest.

Finally, the Act provides other mechanisms to ensure contribution limitation compliance. Section 437g (Supp. 1979) imposes civil and criminal penalties for violating the Act. Moreover, FECA establishes a comprehensive set of reporting requirements. All political committees and separate segregated funds, for example, must file with the Commission information including names of affiliated organizations, names of officers, receipts, expenditures and their recipients, names of each person, organization or political committee which has contributed over $200 per year, and any other information the Commission chooses to require.[9] No single corporation could set up a "dummy" trade association solely to subvert the Act without being exposed by the disclosure requirements and without being subject to criminal sanctions for having willfully violated the Act. Indeed, the Court in *Buckley* rejected the similar argument that limitations on candidate expenditures were necessary to ensure compliance with the Act's contribution limitations because the Act's substantial civil and criminal penalties, coupled with its exhaustive reporting requirements, were sufficient to police against illicit contributions. 424 U.S. at 56. The Court in

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[9] 2 U.S.C. §§ 433-34 (Supp. 1979). I also note 2 U.S.C. § 441a (a)(5) which provides as follows:

> For the purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee. . . .

Buckley sustained the Act's contribution limitations because such limtations still allowed individuals to support candidates through special interest groups. At a time when subsection (D) did not restrict trade asociation solicitation in the present manner, the Court noted with approval that

> [w]hile providing significant limitations on the ability of all individuals and groups to contribute large amounts of money to candidates, the Act's contribution ceilings do not foreclose the making of substantial contributions to candidates by some major special interest groups through the combined effect of individual contributions from adherents or the proliferation of political funds each authorized under the Act to contribute to candidates.

424 U.S. at 28 n.31.

Fifth Amendment Due Process

The majority characterizes the plaintiffs' due process argument as a complaint that subsection (D) prohibits trade associations from soliciting anyone but the executive and administrative employees of their member corporations. The opinion then proceeds to strike down that argument by pointing out that incorporated trade associations have the same solicitation rights as (1) other corporations under § 441b(b)(4)(A) and (B), and (2) other membership organizations under subsection (C), although recognizing that the structure and constituency of trade associations differs radically from that of other corporations and membership organizations.

The plaintiffs' argument is not that they are forbidden by the statute from soliciting anyone other than the group mentioned in subsection (D). Rather, the trade associations argue that while the statute technically does grant them many of the same privileges as those enjoyed by cor-

porations and other membership organizations, these solicitation rights are largely illusory because the actual structure of most incorporated trade associations forecloses these solicitation options. The Supreme Court in *Buckley*, 424 U.S. at 31 n.33, recognized that even when a statute facially appears to be evenhanded "[t]he appearance of fairness, however, may not reflect political reality."

Most trade associations and federated trade associations are incorporated. As corporations, it is true that trade associations theoretically can solicit their own stockholders under § 441b(b)(4)(A). However, the Government conceded in oral argument that most incorporated trade associations are nonprofit corporations which do not have any stockholders. Thus, the typical corporation possesses a substantially greater solicitation pool than an incorporated trade association.

As a corporation, an incorporated trade association may also solicit its own executive and administrative employees and their families pursuant to subsection (A). Again, however, this pool comprises a very small group of solicitees for trade associations in comparison to most corporation. The ABA, for example, has only a twelve person staff. We do not know how many of these twelve are executive or administrative employees. BreadPAC has no staff employees of its own. ABA employees carry out BreadPAC's daily work. Similarly, the small size of most trade association staffs renders meaningless subsection (B)'s additional provision allowing corporations twice yearly to solicit their rank and file employees.

As a membership organization, a trade association can solicit its own indivdual and noncorporate members pursuant to subsection (C). Corporate members are prohibited from contributing by § 441(b)(a). Individual and noncorporate members however, also offer an insignificant solicitation pool to trade associations unlike other more typical membership organizations. The district court found

that "many, if not most, members of trade associations are incorporated."

It is this very difference in structure that should give rise to broadened, not restricted, solicitation rights for trade associations because the statutory avenues of solicitation available to corporations and membership organizations generally prove fruitless when applied to incorporated trade associations. Yet, subsection (D) requires corporate consent to carry on the only form of trade association solicitation which would prove meaningful. My reading of the record indicates that such consent is generally refused.

A comparison between labor organizations and trade associations is illustrative. Labor organizations can, without consent, twice annually solicit shareholders and nonmember employees of corporations with which they have collective bargaining agreements. § 441b(b)(4)(B) (Supp. 1979). Moreover, both a federated labor organization (*e.g.*, AFL-CIO) and its member International (*e.g.*, International Carpenters' Union) can solicit individual members of the locals which comprise the Internationals simultaneously and without prior permission because 11 C.F.R. § 114.1(e) (1980) provides that a local union member is also a member of the federated union for solicitation purposes.

By contrast, a federated trade association must either conduct joint solicitations or have solicitation rights delegated to it in order to solicit the members of its member trade associations. 11 C.F.R. 114.8(g) (1980). Because solicitation of regular trade association member corporations themselves is barred by § 441b(a) as the majority acknowledged, the only practical solicitation of trade association members (most of which are corporations) would be to solicit the trade association member corporation's stockholders and executive and administrative employees,

the human components of the member corporations.[10] Yet, subsection (D) prohibits such solicitation without prior corporate consent.

The Government contended in oral argument that these distinctions between labor organizations and trade associations are valid because federated unions and their International members are "affiliated," and, as such, share a common $5,000 limitation on contribution to candidates for federal office. A federated trade association, however, can only solicit its regional, state and local affiliates or members *if* it is affiliated with these groups and, therefore, shares the $5,000 contribution limitation. 11 C.F.R. § 114.8 (g)(1) (1980). Thus, the purported difference is irrelevant.

The discrimination alleged by the plaintiffs is borne out by the district court's findings of fact. The court found that "[t]he 1976 Amendments to the Act place no comparable prohibitions and limitations upon membership organizations and their political action committees, corporations and their political action committees, labor organizations and their political action committees, or independent political action committees."[11] The unique

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[10] It is understandable that the plaintiffs do not seek to solicit all corporate employees because all corporate employees would not share the same commonality of interest with the trade association as would the corporate shareholders and executive and administrative personnel.

[11] The majority opinion develops at some length an orange-apple lack of relationship between unions and trade associations. I have not, in this dissent, asserted that they are "similarly situated" parties. I do suggest, however, that just as certain loyalties and commonalities of purpose do exist between a union and its membership, similar communities of interest may well exist between corpo-

(footnote continued)

structure and composition characteristic of most trade associations differentiates them from other corporations and membership organizations as detailed above. It is this very difference, augmented by subsection (D)'s prior consent provision, which gives rise to the discrimination which the plaintiffs suffer under the statute as applied.

In order for a discriminatory classification which impacts upon fundamental First Amendment rights to survive judicial scrutiny, the governmental interest served must be substantial and statutory classification narrowly tailored to serve that interest. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 98-99 (1972). As detailed above, subsection (D) is not a narrowly drawn classification which serves the interests asserted.

A true Copy:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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(footnote continued)

rate shareholders and executive employees and the trade associations of which the corporation is a member. These trade associations have been formed for the purposes of advancing the best business interests of the particular trade. It would seem unusual if the shareholders and executive employees, whose own financial well being would be equated with that of the corporation, indeed, the trade, did not have a real interest in supporting the trade associations, that is, if they were allowed to be solicited.

APPENDIX B

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 80-1146

BREAD POLITICAL ACTION COMMITTEE, NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION, LUMBER DEALERS POLITICAL ACTION COMMITTEE, NATIONAL RESTAURANT ASSOCIATION, and the RESTAURATEURS POLICICAL ACTION COMMITTEE,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,
Defendants-Appellees,

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
(Filed December 18, 1980)

NOTICE IS HEREBY GIVEN that Bread Political Action Committee, National Lumber and Building Material Dealers Association, Lumber Dealers Political Action Committee, National Restaurant Association, and the Rectaurateurs Political Action Committee, plaintiffs in the above-captioned case, hereby appeal to the Supreme Court of the United States from the decision filed and the judgment entered on December 5, 1980, by the United States Court of Appeals for the Seventh Circuit. Plaintiffs appeal that portion of the decision rejecting their claims on the merits and answering each of the certified questions

in the negative. This appeal is taken pursuant to 2 U.S.C. §437h(b).

Dated: December 18, 1980

Jeffrey Cole

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Chicago, Illinois 60601
Counsel for Plaintiffs

CERTIFICATE OF SERVICE BY MAIL

I, Jeffrey Cole, a member of the bar of the Supreme Court of the United States and counsel for plaintiffs herein, hereby certify that on December 18, 1980, pursuant to Rule 10.2 of the Rules of the Supreme Court of the United States, I served a copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on each of the parties herein by depositing a copy of the NOTICE OF APPEAL in the United States Mail, Chicago, Illinois, with first class postage prepaid, properly addressed to counsel of record for defendants, Charles N. Steele, Esq., General Counsel, Federal Election Commission, 1325 K Street, N.W., Washington, D.C. 20463, and to The Honorable John W. McGarry, Acting Chairman, Federal Election Commission, 1325 K. Street, N.W., Washington, D.C. 20463.

All parties required to be served have been served.

DATED: December 18, 1980

Jeffrey Cole

Jeffrey Cole
180 North LaSalle Street
Suite 3100
Chicago, Illinois 60601
(312) 782-8300

APPENDIX C

The First Amendment to the Constitution of the United States provides in pertinent part that:

> Congress shall make no law . . . abridging freedom of speech, or . . . of assembly.

The Fifth Amendment to the Constitution of the United States provides in pertinent part that:

> No person shall be deprived of life, liberty or property, without due process of law. . . .

2 U.S.C. §437h provides:

> § 437h. Judicial review
>
> (a) Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc. The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgments, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.
>
> (b) Appeal to Supreme Court; time for appeal. Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.
>
> (c) Advancement on appellate docket and expedited disposition of certified questions. It shall be the duty of the court of appeals and of the Supreme Court of

the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a).

2 U.S.C. §441b provides:

§441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing office, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift

of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock,

from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions ,and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

APPENDIX D

DEPARTMENT OF JUSTICE
Washington 20530

November 3, 1975

Mr. John G. Murphy
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D. C. 20463

Re: *Advisory Opinion Request 1975-23*

Dear Mr. Murphy:

Reference is made to several informal discussions between our respective staffs concerning the referenced Advistory Opinion Request (A.O.R.), which has been submitted to the Commission by two political committees affiliated with the Sun Oil Corporation pursuant to 2 U.S.C. 437f, and to your draft Advisory Opinion which your staff was kind enough to make available to us for review and comment.

The A.O.P. seeks the views of the Commission on whether the Sun Oil Corporation may defray the administrative expenses of the two political committees consistent with 18 U.S.C. 610. The draft Advisory Opinion proposed by your staff would conclude that neither political committee may do so on the facts presented. For reasons described below, we disagree.

From the description provided in the A.O.R., SUN-EPA appears to us to represent an activity by the Sun Oil Corporation through which the corporation encourages its employees to participate in politics in general, including making personal contributions to candidates or political committees of their choice. To facilitate the latter, the

corporation offers to its employees a convenient payroll deduction plan where the employee may request the payroll office to withhold a portion of his salary which is transmitted by the corporation to candidates or political committees designated by the contributing employee. Provided that the corporation in no manner suggests to the contributing employee the identity of certain candidates or committees which should be the beneficiaries of such personal contributions, provided that absolutely no pressure of any kind is applied to induce participation in the program, and provided corporate funds are not indirectly contributed to the ultimate recipients through such means as artificially inflating employees' salaries, we would tend to view the corporate disbursements effected to administer such a program as "non-partisan" in nature. That is to say, under these stringent circumstances, such corporate disbursements, in themselves, could not be said to favor one candidate for Federal office over his opposition, although the general objective of the program is certainly "political" in that it encourages employees to participate voluntarily in politics through *personal* contributions of the *employees' own choosing.*

We have long been of the opinion that 18 U.S.C. 610 cannot be applied to prohibit unions and corporations from using their general assets to engage in activities which are completely non-partisan in nature consistently with the First Amendment. In this regard, such a prohibition would certainly have an effect on expression, albeit an indirect one. At the same time, we fail to see how the application of Section 610 to non-partisan expenditures such as this serves any compelling Federal interest, or is even remotely related to either of the two purposes which the section was enacted to protect: i.e. to protect the integrity of the Federal elective system from the corrupting

influence of infusions of vast aggregates of corporate and union wealth, and to protect the interests of minority stockholders and union members from having their monies used to support political candidates they personally oppose. Moreover, there is dicta in several cases decided under 18 U.S.C. 610 which, in our view, reflect a judicial recognition that this statute prohibits only the support of partisan political activity. See: *United States* v. *Auto Workers*, 352 U.S. 567 (1957); *United States* v. *Pipefitters Local Union #562*, 434 F.2d 1116, 1121 (8th Cir. 1970); *United States* v. *Construction and General Laborers Local #264*, 101 F. Supp. 869, 875 (D. Mo. 1951); *Cort* v. *Ash*, 496 F.2d 416 (3rd Cir. 1974), reversed on other grounds, 422 U.S. 65 (1975). Finally, the fact that the Hansen Amendment, added to Section 610 by the 1971 Federal Election Campaign Act, recognized a "non-partisan" exception only in the case of "voter registration drives" and "get-out-the-vote compaigns" which were directed at a corporation's stockholders and a union's members, is not dispositive of the matter. The 1971 amendatory language was intended primarily to codify preexisting case law, which was indicated above recognized a broader "non-partisan" exception to this statute. *United States* v. *Pipefitters Local #562*, 407 U.S. 385 (1972). A construction of this language which would render it narrower than First Amendment requirements would be illogical and inconsistent with the rule of statutory construction that where possible statutes should be interpreted to achieve constitutional results.

SUN-PAC, from the description given in the A.O.R., would appear to us to satisfy all of the statutory requirements of a voluntary segregated fund, except that it intends to solicit the corporation's employees, as well as its stockholders and their families. The preliminary conclusion of your staff that this particular "segregated fund"

is not among those permitted by 18 U.S.C. 610, as amended, seems to us to be predicated upon concern that the statutory text itself, given a strict reading, confines the "segregated fund" exception exclusively to funds which confine their solicitations to union members, corporate stockholders, and their respective families.

As indicated above, it has been our view that a strict reading of the scope of such limiting language, descriptive of an exception to a criminal statute, is not appropriate where it would lead to a result which infringes upon Constitutionally-protected activity. Here we note that at least one Circuit Court has addressed the concept of the segregated fund in Constitutional terms and concluded that members of a union have a right under the First Amendment to associate together through a political committee affiliated with the union, to express themselves politically through such a committee, and that it would be a derogation of these First Amendment rights to prohibit the union from defraying the administrative expenses of such a committee or from controlling the disposition of any funds which it voluntarily raises from its membership. *United States* v. *Pipefitters Lolcal #562*, 434 F.2d 1116, 1119-1121 (8th Cir. 1970), reversed on other grounds, 407 U.S. 385 (1972). Although this analysis was conducted in the context of union members, we suggest that it is equally applicable to any group of individuals which has a "special relationship" to the union or the corporation which is sponsoring the segregated fund in question. See: *United States* v. *C.I.O.*, 335 U.S. 106, 121 (1948). While we recognize that there may be many grey areas presenting difficult questions as to whether a given class enjoys an adequately close affinity of interest with a given union or corporation so as to require that its segreated fund be permitted to solicit them, employees of a corporation (or

the employees of a union for that matter) are certainly within this class. Indeed, very recently the Supreme Court has expressly held that 18 U.S.C. 610 does not prohibit a union-supported segregated fund from soliciting voluntary contributors from the union's employees. *United States* v. *Pipefitters*, 407 U.S. 385, 409. It is, therefore, only logical that the segregated fund exception to this section has the same reach with respect to corporations.

For these reasons, we would be disposed to decline prosecution under 18 U.S.C. 610 of any facts situation such as those described in Advisory Opinion Request 1975-23 concerning SUN-EPA and SUN-PAC.

Sincerely,

Richard L. Thornburgh

RICHARD L. THORNBURGH

Assistant Attorney General

APPENDIX E

ADVISORY OPINIONS

[¶5403] AO 1979-13: *Description of PAC Activities in Company Newsletter*

[*A description of PAC activities cannot appear in a company newsletter since this is considered a solicitation and the newsletter would be distributed to non-solicitable persons, such as retirees. Answer to A. Pearce Godley, Chairman, RAYPAC, 2801 S. Post Oak Road, Houston, Texas 77066.*]

This is in response to your letter of March 26 and April 5, 1979, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to publicizing the existence of the Raymond International Inc. Employees' Political Action Committee ("RAYPAC").

Your letter states that RAYPAC is a separate segregated fund established by Raymond International Inc. ("the Corporation") and empowered by the corporation to ony solicit executive and administrative personnel, stockholders, and their spouses. *You add the Corporation publishes a newsletter, entitled the "Raymond Record," six times a year for the information of employees and retirees of the Raymond Group of Companies.* It is distributed to all of the Corporation's *permanent employees and retirees, as well as stockholders and certain other interested parties on request.* Attached with your letter is an article which you are considering for inclusion in the "Record." *The article states the amount of money raised and spent by RAYPAC and the methods used by RAYPAC in determining to whom it should contribute.* The article further

points out the number of corporate employees who "participated in" RAYPAC's activities in 1978 and includes a quotation from you as RAYPAC chairman:

> "I was glad to see that Raymond has so many employees who realize that the welfare of us all is tied very closely to government policies and attitudes toward business. RAYPAC is one way we can make the voice of business people and our industry heard in this country. I hope we continued [sic] to have such an enthusiastic group."

You ask whether, *under these circumstances, inclusion of the article in the "Record would be permissible under the Act.* If not, you ask whether such article would be permissible without the sentence: "However, the PAC's by-laws state that RAYPAC may accept voluntary contributions for any lawful contributor."

Under the Act, a corporation or a separate segregated fund established by a corporation may make two written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. 2 U.S.C. §441b(b)(4)(B). Section 114.6 of the Commission's regulations provides that such solicitations may be made only by mail addressed to stockholders, executive and administrative personnel, or employees at their residences, and must inform the recipient of the requirements of this section. For purposes of this section the term "employees" does not include retired employees who are not stockholders. 11 CFR 114.6(a).

Since the "Record" reaches a group of persons which RAYPAC may not generally solicit for contributions except as provided under §114.6, the issue presented is whether the proposed article is a solicitation for contributions to RAYPAC and thus prohibited from being included in the "Record."

OPINIONS

The legislative history of the Act indicates that informing persons of a fundraising activity is considered a solicitation. See Advisory Opinions 1976-27, [¶5213], 1976-96 [¶5227], and 1978-17 [¶5307], copies enclosed. See particularly AO 1976-27 which includes quotes from Senators, Allen, Cannon, and Packwood during Senate floor debates on the 1976 Amendments to the Act. Also, Representative Hays of Ohio, in explaining the corporate and union solicitation provisions of the 1976 Amendments (2 U.S.C. §441b), stated:

> [We] determined that any action [that] could fairly be considered a request for a contribution should be treated as a solicitation. 122 Cong. Rec. 43779 (daily ed. May 3, 1976).

The Commission is, accordingly, of the view that the proposed article would be a solicitation within the meaning of the Act since it describes PAYPAC's activities and encourages participation in RAYPAC by commending the enthusiasm of employees whose participation in RAYPAC has indicated awareness of the connection between their welfare and government policies toward business. Therefore the article may not be included in the "Record" or any other publication of the Corporation which is distributed to persons that RAYPAC is otherwise prohibited from soliciting for contributions.

Additionally, your letter asks whether the article would be acceptable for inclusion in the "Record" by removing the sentence which states: "However, the PAC's bylaws state that RAYPAC may accept voluntary contributions from any lawful contributor." The Commission answers this question in the negative. The elements of the article as discussed above that make it a contribution solicitation

would still be present in the proposed article even with the deletion of that particular sentence.

Your letter makes reference to Advisory Opinion 1978-97 wherein the Commission concluded that a contribution solicitation could be included in a membership publication because the organization involved took certain precautionary steps to instruct its personnel that contributions to the PAC must be checked and returned if made by a nonmember of the organization, and because the solicitation was primarily directed only at its members (with an incidental circulation beyond its membership). In your case, however, neither the Corporation nor RAYPAC propose to take precautionary measures like those described in AO 1978-97 [¶5385]. Moreover, the medium for the solicitation (i.e. the "Record") is not directed only to the executive and administrative personnel of the Corporation, but rather to a larger group of persons that RAYPAC is either prohibited from soliciting altogether or must solicit under the conditions of 11 CFR 114.6. If the Corporation or RAYPAC take precautionary measures as described in AO 1978-97 and if the "Record" has only an incidental circulation to persons that RAYPAC is either prohibited from soliciting altogether or must solocit under the conditions of 11 CFR 114.6, the proposed article would not then be refused as an improper contribution solicitation under the Act and regulations.

This response constitues an advisory opinion concerning the application of a general rule of law stated in the Act or prescribed as a Commission regulation, to the specific factual situation set forth in your request. See 2 U.S.C. §437f.

Dated: May 25, 1979.

DISSENTING OPINION
OF
COMMISSIONERS JOAN D. AIKENS AND MAX L. FRIEDERSDORF
TO
ADVISORY OPINION 1979-13

Raymond International seeks to publish an article in its corporate newsletter which would inform its employees of the activities and existence of its separate segregated fund, RAYPAC. The Commission has determined that the publishing of such an article constitute a solicitation subject to the restrictions of 2 U.S.C. §441b(a). We disagree with that conclusion which, in our opinion, is unsupportable by either the statute, the Commission's regulations or the legislative history of the Act.

The statute does not define the word "solicitation," nor do the Commission's regulations. Furthermore, there is nothing in the statute or the context in which the word "solicitation" is used to indicate a Congressional intent to regulate something other than the persons and circumstances under which a PAC may request voluntary political contributions. Nonetheless, this Advisory Opinion and others before it conclude that "informing persons of a fundraising activity is considered a solicitation." (See Advisory Opinion 1976-27 [¶5213].) In other words, a "solicitation" is not merely a request for a contribution, but it is also any other activity which, in the absence of a request, might in some way provoke an individual to make what is in effect an unsolicited contribution. This is a truly remarkable contortion of what we consider to be a simple word which has a self-evident meaning.

It is equally remarkable that the legal justification for this interpretation is the tautology quoted in the Opinion and attributed to Representative Hays, i.e., a solicitation is a request for a contribution. (Another piece of legislative history, a colloquy between Senators Allen, Cannon and Packwood and referred to in the Opinion, is equally inconclusive and unenlightening.)

What is happening here has been previously (and unsuccessfully) attempted by the Commission in another question of interpretation. Recently, a Federal District Court has rejected the Commission's attempt to apply the rules of "express advocacy," to a communication in which advocacy was merely implied. *FEC* v. *AFSCME* (D.C. Cir.) Civil Action No. 78-2114 [¶9078]. It is simply a matter of time before a court similarly concludes that restrictions on §441b solicitations are not applicable to a communication such as the one proposed by RAYPAC which merely "describes RAYPAC's activities and encourages employeee participation in RAYPAC by commending the enthusiasm of employees whose participation in RAYPAC has indicated an awareness of the connection between their welfare and government policies towards business." Descriptions and commendations for enthusiasm do not sound like solicitations to us.

Dated: May 23, 1979.

Office-Supreme Court, U.S.
FILED
SEP 2 1981
ALEXANDER L. STEVAS, CLERK

No. 80-1481

In the Supreme Court of the United States

OCTOBER TERM, 1981

BREAD POLITICAL ACTION COMMITTEE, NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION, LUMBER DEALERS POLITICAL ACTION COMMITTEE, NATIONAL RESTAURANT ASSOCIATION and the RESTAURATEURS POLITICAL ACTION COMMITTEE,

Appellants,

v.

THE FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

APPEAL DOCKETED MARCH 2, 1981.
JURISDICTION POSTPONED JULY 2, 1981.

In the
Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1481

BREAD POLITICAL ACTION COMMITTEE, NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION, LUMBER DEALERS POLITICAL ACTION COMMITTEE, NATIONAL RESTAURANT ASSOCIATION and the RESTAURATEURS POLITICAL ACTION COMMITTEE,

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APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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APPENDIX

DATE OF FILING	LIST OF DOCUMENTS
3-22-77	Filed complaint and 13 copies. JS5
3-22-77	Filed civil cover sheet.
3-22-77	Filed affidavit re general rule 39.
3-22-77	Issued summons and 13 copies with 13 copies of complaint. gg
4-12-77	Filed Marshal's return of summons and complaint, return served as to Vernon Thomson, Thomas Harris, Neil Staebler, Joan Aikens, Robert Tiernan, Federal Election Commission, William Springer, Edward Henshaw. (8 services) gg
4-15-77	Filed Marshal's return of summons and complaint. return served as to Samuel Skinner, by cert. mail. gg
6-2-77	Filed Marshal's return of summons and complaint, return unexecuted as to Honorable Francis R. Valeo. gg
6-8-77	Filed motion of the Federal Election Commission to dismiss for lack of jurisdiction. gg
6-10-77	Filed defendant Griffin Bell's Notice.
6-10-77	Filed defendant Griffin Bell's motion to dismiss.
6-10-77	Filed defendant Griffin Bell's memorandum in support of motion to dismiss.
6-14-77	Enter order dated June 10, 1977; Government's motion to dismiss defendant Griffin Bell, granted.

List of Documents

Plaintiff granted to and including June 24, 1977 to answer; defendant to reply on or before July 8, 1977. Federal Election commission's motion to dismiss taken on briefs. Court to rule by mail. —MARSHALL, J

Notices Mailed 6-14-77 gg

6-30-77 Enter order dated June 29, 1977; Enter order directing plaintiffs to serve William C. Oldaker, 1325 K Street N.W., Washington, D.C. with all papers, —MARSHALL, J

Notices Mailed 6-30-77 gg

7-8-77 Filed plaintiffs' notice of motion with motion re leave to file response. gg

7-8-77 Filed plaintiffs' response to defendants' motion to dismiss the complaint.

7-11-77 Enter order dated July 8, 1977; Plaintiffs' motion to file instanter its response to defendants' motion to dismiss and plaintiffs' motion for leave to file brief in excess of 15 pages, granted. —MARSHALL, J

Notices Mailed 7-11-77 gg

7-11-77 Filed defendant Federal Election Commission motion for extension of time in which to file defendants' reply to plaintiffs' response to motion to dismiss. gg

7-8-77 Filed defendant Federal Election Commission's motion for extension of time in which to file defendants' reply to plaintiffs' response to motion to dismiss.

List of Documents

7-18-77 Enter order dated July 8, 1977; Defendant's motion for extension of time in which to file reply to plaintiffs' opposition to and including July 25, 1977 granted. —MARSHALL, J

Notices Mailed 7-18-77 gg

7-28-77 Filed defendant Federal Election Commission's notice of motion with motion for leave to file instanter with reply to plaintiffs' response to defendants' motion to dismiss the complaint. not available gg

8-2-77 Enter order dated July 29, 1977; Defendant Federal Election Commission's motion for leave to file its reply to plaintiffs' response to defendants' motion to dismiss instanter is granted. —MARSHALL, J

Notices Mailed 8-2-77 gg

8-26-77 Filed plaintiff Bread Political Action Committee's emergency motion for an expedited ruling on the Federal Election Commission's motion to dismiss the complaint.

8-29-77 Enter order dated August 26, 1977; Ruling on the Federal Election Commission's motion to dismiss the complaint to be made by mail.—MARSHALL, J

Notices Mailed 8-29-77 gg

9-2-77 Filed plaintiff's Breadpac motion for reconsideration of this court's ruling of Friday, August 26, 1977.

9-6-77 Enter order dated September 2, 1977; The above cause is continued to September 7, 1977 at 9:15

a.m. for plaintiff to present a motion to certify class. —MARSHALL, J

Notices Mailed 9-6-77 gg

9-9-77 Enter order dated September 7, 1977; Defendants' motion to dismiss is denied. —MARSHALL, J

Notices Mailed 9-9-77 gg

9-7-77 Filed plaintiffs' motion for immediate certification of certain questions pertaining to the constitutionality of the Federal Election Campaign Act Amendments of 1976.

9-9-77 Enter order dated September 7, 1977; Plaintiffs' motion for immediate certification to the Court of Appeals for the Seventh Circuit of certain questions pertaining to the constitutionality of the Federal Election Campaign Act of 1976, is denied. —MARSHALL, J

Notices Mailed 9-9-77 gg

9-7-77 Filed plaintiff's motion, Bread Political Action Committee, for a preliminary injunction.

9-9-77 Enter order dated September 7, 1977; On plaintiffs' motion for preliminary injunction, plaintiffs ordered to file their brief within 10 days; defendants to file their answering brief 7 days after service of plaintiffs' brief; plaintiffs to file their reply brief within 3 days of service of defendants' answering brief. —MARSHALL, J

Notices Mailed 9-9-77 gg

9-12-77 Filed defendant Federal Election Commission's motion to submit copy of Clark vs. Valeo. gg

List of Documents

9-28-77 Filed defendant Federal Election Commission's motion for leave to file instanter with answer and notice of motion gg

9-26-77 Filed defendant Federal Election Commission's notice of motion

9-26-77 Filed defendant Federal Election Commission's motion for leave to file instanter.

9-26-77 Filed defendant Federal Election Commission's ANSWER.

10-3-77 Enter order dated September 26, 1977; Defendants' motion for leave to file instanter its answer, granted. —MARSHALL, J

NOTICES Mailed 10-3-77 gg

9-30-77 Filed defendant Federal Election Commission's motion for extension of time in which to file brief. gg

9-30-77 Filed defendant Federal Election Commission's motion for extension of time in which to file brief.

10-5-77 Enter order dated September 30, 1977; Defendant's motion for extension of time to and including October 3, 1977 to file its reply to Breadpac's papers, granted. —MARSHALL, J

Notices Mailed 10-5-77 gg

10-3-77 Filed plaintiff Bread Political Action Committee's reply memorandum.

10-5-77 Filed defendant Federal Election Commission's opposition to plaintiff Breadpac's motion for a preliminary injunction. gg

10-7-77 Enter order dated October 6, 1977; For the reason stated in open court, plaintiff's motion for preliminary injunction is denied.—MARSHALL, J

Notices Mailed 10-7-77 gg

11-2-77 Filed plaintiffs' motion for permission to appeal this court's refusal to transfer the case to the United States Court of Appeals for the seventh circuit as required by 2 USC §437(h).

11-4-77 Enter order dated November 2, 1977; Plaintiffs motion for permission to appeal is granted. — MARSHALL, J not available

Notices Mailed 11-4-77 gg

11-9-77 Enter order dated November 8, 1977; Enter order of certification to the U.S. Court of Appeals for the seventh Judicial Circuit pursuant to 28 USC § 1292 (b). (draft) —MARSHALL, J

Notices Mailed -1-9-77 gg

11-10-77 Clerk's file copy of transcript of proceedings had before Hon. Prentice Marshall on September 7, 1977 and filed by official court reporter. under separate cover

11-10-77 Clerk's file copy of transcript of proceedings had before Hon. Prentice Marshall on October 6, 1977 and filed by official court reporter. under separate cover

11-10-77 Clerk's file copy of transcript of proceedings had before Hon. Prentice Marshall on November 2, 1977 and filed by official court reporter. under separate cover gg

List of Documents

12-21-77 Filed certified copy of order from USCA: "It is ordered by this court, sua sponte, that leave is hereby granted to file instanter nunc pro tunc as of December 6, 1977, the tendered four (4) copies of the "plaintiffs' response to defendants' opposition to plaintiffs' request for permission to appeal". IT IS FURTHER ORDERED that permission for leave to appeal pursuant to 28 USC §1292 (b) is hereby granted. Counsel for the plaintiff-petitioners is hereby directed to comply with rule 5 (d) of the FRAP. not available gg

12-28-77 Filed bond for costs on appeal.

12-28-77 Filed designation for record on appeal, by plaintiff-appellant. gg

1-9-78 Filed designation of record on appeal for additional parts by defendant-appellee.

2-1-78 Certified and transmitted supplement to the record on appeal to the U. S. Court of Appeals consisting of: (1) U.S.C.A. order filed December 21, 1977. gg

7-27-78 Filed affidavit re gen rule 39 by Jeffrey Cole. gg

1-17-79 Enter order dated Jan. 16, 1979; Case set for status, scheduling and to set for hearing Jan. 29, 1979 at 9:30 am —MARSHALL J

1-29-79 Enter order dated Jan. 29, 1979; Status hearing held. Pretrial memrandum filed, pretrial materials due on or before March 19 1979. Status hearing set for March 19, 1979 at 9:30 am Cause set for trial on March 26, 1979 at 10 am —MARSHALL J

List of Documents

2-22-79 Filed 2-21-79 defendant Federal Election Commission's request for production of documents of plaintiff Breadpac

2-22-79 Filed 2-21-79 defendant Federal Election Commission's interrogatories propounded to plaintiff Breadpac (first set)

2-22-79 Filed 2-21-79 defendant Federal Election Commission's request for production of documents of plaintiff National Lumber and Building material dealers association and lumber dealers political action committee.

2-22-79 Filed 2-21-79 defendant Federal Election Commission's request for production of documents of plaintiff National Restaurant association and restaurateurs political action committee. gg

3-7-79 Filed 3-6-79 Federal Election Commission's motion for leave to file instanter

3-7-79 Filed 3-6-79 Federal Election Commission's motion to reschedule the due dates for the pretrial status hearing and trial with points and authorities in support of motion

3-7-79 Filed 3-6-79 Federal Election Commission's motion for leave to file in excess of 20 interrogatories with attachments a - c. gg

3-7-79 Enter order dated March 5, 1979; On motion of defendant, leave is granted to file in excess of 20 interrogatories; on motion of defendant, time for filing pretrial materials is extended to April 23, 1979; report on status continued to April 23, 1979 at 9:30 am cause continued for trial to April

30, 1979 at 10 am This will be the only and final continuance of the trial —MARSHALL, J

3-20-79 Filed 3-20-79 opinion.

3-20-79 Filed certified copy of order from USCA 7th Circuit dated Jan. 12, 1979, "On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from be, and the same is hereby, reversed, with costs, and the cause is remanded, in accordance with the opinion of this court filed this date." gg

3-30-79 Filed 3-20-79 defendant Federal Election Commission's notice to take deposition of Bread Political Action Committee. gg

4-9-79 Filed 4-9-79 plaintiffs' objections to defendants' interrogatories gg

4-13-79 Filed 4-12-79 answers of Bread Political Action Committee to interrogatories of defendants.

4-13-79 Filed 4-12-79 answers of National Restaurant Association and Restaurateurs Political Action Committee to defendants' interrogatories

4-13-79 Filed 4-12-79 answers of LUDPAC and NLBMDA to defendants' interrogatories gg

4-24-79 Enter order dated April 23, 1979: Status hearing held. — MARSHALL, J

4-25-79 Filed 4-23-79 defendant Federal Election Commission's proposed stipulation of uncontested facts and statement of contested facts.

4-25-79 Filed 4-23-79 defendant Federal Election Commission's pre trial brief.

List of Documents

4-25-79 Filed 4-23-79 defendant Federal Election Commission's exhibits, witnesses, and depositions which may be introduced at trial by defendant Federal Election Commission. gg

4-27-79 Filed 4-26-79 defendant Federal Election Commission's response to plaintiffs' request for production of documents. gg

4-30-79 Filed 4-25-79 letter addressed to Judge Marshall, dated April 25, 1979 and signed by Jeffrey Cole. gg

5-1-79 Filed 4-30-79 plaintiffs' motion for entry of a protective order.

5-1-79 Filed 4-30-79 plaintiffs' motion for leave to amend the complaint.

5-1-79 Filed 4-30-79 plaintiffs' motion to compel discovery; copy of request for production of documents.

5-1-79 Enter order dated April 30, 1979; Plaintiff granted leave to file motion for leave to amend complaint; motion for entry of a protective order; and motion to compel discovery. Defendant to answer motions by May 14, 1979 at 9:30 am. —MARSHALL, J

5-4-79 Enter order dated May 3, 1979; Ruling date of May 14, 1979 is reset to May 15, 1979 at 9:30 am. —MARSHALL J

5-16-79 Filed 5-15-79 Federal Election Commission's opposition to plaintiffs' motion for leave to amend their complaint.

List of Documents

5-16-79 Filed 5-15-79 response of the Federal Election Commission to plaintiffs' motion for entry of a protective order.

5-16-79 Filed 5-15-79 opposition of the Federal Election Commission to plaintiffs' motion to compel discovery. gg

5-17-79 Enter order dated May 15, 1979; Ruling is continued to May 21, 1979 at 9:30 am. — MARSHALL, J

5-22-79 Enter order dated May 21, 1979; Plaintiff's motion for leave to amend complaint, granted. Defendant to answer as amended within 10 days. Plaintiff's motion for entry of a protective order is denied. Plaintiff's motion to compel discovery is granted. Defendant to produce documents within 2 weeks. Cause set for status hearing on June 15, 1979 at 9:30 am. — MARSHALL, J

6-4-79 Filed 6-1-79 defendant Federal Election Commission's answer to plaintiffs' amendments to their complaint. gg

6-18-79 Enter order dated June 15, 1979; Cause called for status hearing, parties failed to appear. Status hearing continued to November 8, 1979 at 9:30 a.m. —MARSHALL, J

7-2-79 Enter order dated June 29, 1979; Upon receipt of a letter from counsel for plaintiff, which has been filed this date, the order entered on June 15, 1979 is modified to show that the status report on that date was continued by agreement; it is further ordered that cause be set for status on September 11, 1979 at 9:30 a.m. and that the

November 8, 1979 status date is vacated. —MARSHALL J

7-2-79 Filed 6-26-79 letter dated June 26, 1979 addressed to Judge Marshall, dated June 26, 1979 and signed by Jeffrey Cole. gg

7-2-79 Filed 7-2-79 deposition of Joseph William Hobson. gg

9-4-79 Filed 8-31-79 clerk's file copy of transcript of proceedings had before Hon. Prentice Marshall on January 29, 1979 and filed by official court reporter. gg

9-7-79 Enter order dated September 6, 1979; Status hearing date of September 11, 1979 is reset to October 5, 1979 at 12 noon. —MARSHALL, J

10/11/79 Enter order dated October 5, 1979: Status hearing held. Plaintiff to file findings of fact and questions to be certified by October 19, 1979. Defendant to respond by November 2, 1979. Ruling set for November 16, 1979 at 9:30 a.m. MARSHALL, J

10/11/79 Filed Joint Stipulation of Uncontested facts.

10/11/79 Enter order dated October 10, 1979: Status hearing date of November 8, 1979 is stricken. Ruling date of November 16, 1979 to stand. MARSHALL, J

10/11/79 Filed 10/10/79 Deposition of Brian G. Harron.

10/11/79 Filed 10/10/79 Deposition of Francis M. Andrews.

10/11/79 Filed 10/10/79 Deposition of Robert J. Wager. pam

List of Documents

10/11/79 Filed 10/10/79 Deposition of Francis S. Andrews. pam

11/9/79 Filed 11/8/79 Federal Election Commission's Reply to Plaintiff's Proposed Statement of Constitutional Questions for Certification to the USCA, 7th Circuit; certificate

11/9/79 Filed 11/8/79 Amended Statement of Exhibits Which May be Introduced at Trial by Defendant, Federal Election Commission.

11/9/79 Filed Defendants Exhibits 4-01 thru 4-15 (12 bound blue volumes).

11/9/79 Supplemented Record on Appeal to USCA 7th Circuit consisting of above documents.

Note: Original record returned from USCA 7th Circuit msn

REVERSED & REMANDED 3/20/79 msn

11/19/79 Enter order dated 11/16/79; Ruling is continued to November 30, 1979 at 9:30 A.M. MARSHALL, J

Notices mailed 11/19/79. mf

11-30-79 Filed 11-28-79 Plaintiffs' response to the Federal Election Commission's reply to plaintiffs' proposed statement of constitutional questions for certification to the United States Court of Appeals for the Seventh Circuit. hd

12-3-79 Filed 11-28-79 Plaintiffs proposed statement of constitutional questions for certification to the United States Court Of Appeals for the Seventh Circuit.

List of Documents

12-3-79 Filed 11-28-79 Plaintiffs proposed findings of fact.

12-3-79 Filed 11-8-79 Federal Election Commission's reply to plaintiff's proposed statement of constitutional questions for certification to the United States Court Of Appeals for the Seventh Circuit.

12-3-79 Filed 11-28-79 Plaintiff's response to the Federal Election Commission's reply to plaintiffs' proposed statement of constitutional questions for certification to the United States Court of Appeals for the Seventh Circuit.

12-3-79 Enter order dated 11-30-79: Parties directed to prepare draft orders. MARSHALL, J

12-3-79 Filed 11-8-79 Certificate of service. bgm

12-20-79 Enter Order dated 12-19-79: Findings of Facts entered (DRAFT) MARSHALL, J.

12-21-79 Enter Order dated 12-19-79: Enter Constitutional Questions certified to the U. S. Court of Appeals for the Seventh Circuit. (DRAFT) MARSHALL, J.

1-3-80 Filed 12-19-79, joint letter dated 12-14-79 re submission of constitutional questions certified to the U.S.C.A. 7th Circuit. bb

1-16-80 Enter order dated 1-15-80: The Clerk of this Court is directed to certify and transmit the entire record of proceedings in this action to the Court of Appeals for the Seventh Circuit.—Marshall, J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 77 C 947

BREAD POLITICAL ACTION COMMITTEE, NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION, LUMBER DEALERS POLITICAL ACTION COMMITTEE, NATIONAL RESTAURANT ASSOCIATION, and the RESTAURATEURS POLITICAL ACTION COMMITTEE,

Plaintiffs,

v.

THE FEDERAL ELECTION COMMISSION, HONORABLE FRANCIS R. VALEO, Secretary, United States Senate and Ex-Officio Member of the Federal Election Commission, HONORABLE EDWARD HENSHAW, Clerk of the United States House of Representatives and Ex-Officio Member of the Federal Election Commission, HONORABLE VERNON W. THOMSON, Chairman, Federal Election Commission, HONORABLE THOMAS E. HARRIS, Vice Chairman, Federal Election Commission, HONORABLE NEIL STAEBLER, WILLIAM SPRINGER, ROBERT O. TIERNAN, and JOAN D. AIKENS, Commissioners, Federal Election Commission, and the HONORABLE GRIFFIN BELL, Attorney General of the United States,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, Bread Political Action Committee, National Lumber and Building Material Dealers Association, Lumber Dealers Political Action Committee, National Restaurant Association, and the Restaurateurs Political Action Committee, by their attorneys, Jerome H. Torshen, Jeffrey Cole and Richard J. Carmel, for their Complaint against the Defendants, state as follows:

JURISDICTION

1. This action seeks a judgment declaring that certain provisions of the Federal Election Campaign Act Amendments of 1976 ("the Act"), (2 U.S.C. § 431 *et seq.*), both facially and as applied to the Plaintiffs, constitute an unconstitutional abridgment of the Plaintiffs', their members' and their members' members' rights to freedom of speech and association and their rights to due process of the law in violation of the First and Fifth Amendments to the Constitution of the United States.

2. This action also seeks a permanent injunction, restraining enforcement of the offending provisions of the Act.

3. The Plaintiffs in this case have been and will continue to be irreparably and immediately harmed by the offending provisions of the Act, and a case and controversy exists between the parties within the meaning of Article III of the Constitution of the United States.

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331(a), 2201 and 2202, and 2 U.S.C. § 437h (1976).

5. Pursuant to 2 U.S.C. § 437h, Plaintiffs respectfully request expedited consideration of the questions presented and expedited certification of those questions to the United States Court of Appeals for the Seventh Judicial Circuit (*En Banc*).

PARTIES

6. Plaintiff, Bread Political Action Committee ("BreadPAC"), is a duly constituted non-partisan political action committee registered in accordance with the applicable provisions of the Federal Election Campaign Act of 1971. Pub. L. No. 92-224, 86 Stat. 3, 92d Congress, 1st Sess., 2 U.S.C. § 431(f)(4)(h).

BreadPAC was created and is administered by the American Bakers Association ("ABA"), a not-for-profit corporation incorporated and existing pursuant to the laws of the State of Illinois. Formed in 1944, the ABA's corporate purposes are, *inter alia*, a) to encourage legislation and regulations in the best interests of the Baking Industry through representing the Industry before federal and state legislative bodies, administrative agencies, and consumer groups, b) to increase public understanding of the Baking Industry and the value of its products, c) to promote the nutritional quality of its products, standards of sanitation and safety, d) to educate its members concerning compliance with federal and state laws, and e) to secure cooperation of all bakers and allied organizations in carrying out these purposes.

The ABA is composed of approximately 350 corporate members. Of the 350 corporate members, a substantial number are members of at least one or more separate, distinct trade associations. This overlapping membership stems from the diversity of business interests of many of ABA's members.

7. The purposes of BreadPAC are to protect and strengthen the private enterprise system and American free institutions and to protect and advance the American Baking Industry by supporting those candidates for Federal office whose views are consonant with and sympathetic to those ideals.

8. To advance these goals, contributions are solicited from identified individuals acting on their own behalf, and these contributions are expended by BreadPAC to assist, by means of direct non-partisan financial donations, the campaigns of candidates for Federal office whose views are most harmonious with the goals of BreadPAC and the ABA.

9. Plaintiff, the National Restaurant Association ("NRA"), is a not-for-profit corporation incorporated and existing pursuant to the laws of the State of Illinois and having its headquarters and executive offices at Chicago, Illinois. Formed in March, 1939, its corporate purposes are, *inter alia*, to organize, establish, promote, aid or engage in activities exclusively for charitable, scientific, literary or educational purposes in the fields of agriculture, nutrition, public health, preparation of food, equipment research, human relation studies and other related subjects insofar as such studies and research are undertaken for the betterment of the general public.

10. The NRA is composed of approximately 5,400 corporate members and at least an equal if not greater number of individuals and other non-corporate members. Of the total membership of NRA, a substantial number of corporate (and non-corporate) members are engaged in more than one industry and thus belong to one or more separate distinct trade associations. This overlapping membership stems from the diversity of business interests of many of NRA's members.

11. Plaintiff, the Restaurateurs Political Action Committee ("RPAC"), is a duly organized, not-for-profit, non-partisan political action committee formed in about 1963 by the NRA to protect and promote the interests of the food service industry by supporting candidates to the United States Congress who recognize the need for fiscal integrity and the worth and importance of the free enterprise system. RPAC maintains offices in Chicago, Illinois. RPAC is duly registered with the Federal Election Commission.

12. Plaintiff, the National Lumber and Building Material Dealers Association ("NLBMDA"), is an incorporated federation of thirty local, state and regional associations representing 15,000 retailers across the nation. Incorporated and existing pursuant to the laws of the State of Illinois, NLBMDA is devoted to analyzing and resolving business problems common to lumber and building materials dealers. To attain these ends, NLBMDA provides its membership with special service programs including publications and seminars. Additionally, NLBMDA periodically prepares statements and position papers for submission before various congressional committees, prepares informational publications, and expresses its view to Congressmen and federal agency personnel on matters affecting the lumber and allied industries.

13. A substantial number of NLBMDA's corporate association members are also members of at least one or more separate and distinct trade associations, and a substantial percentage of the members which in turn constitute the membership of the corporate associations are also members of at least one or more separate and distinct trade associations. This overlapping membership stems from the diversity of business interests of NLBMDA's members and underlying members.

14. Plaintiff, the Lumber Dealers Political Action Committee ("LuDPAC"), is a duly organized not-for-profit, non-partisan political action committee formed in 1975 by the National Lumber and Building Material Dealers Association in conformity with the applicable provisions of the Federal Election Campaign Act of 1971. LuDPAC is designed to assist, through financial contributions, the campaign funds of those candidates for election or re-election to the United States Senate and House of Representatives who have demonstrated support for the principles of private enterprise and sound fiscal and monetary policies for which LuDPAC and NLBMDA stand.

15. All of the Plaintiffs are engaged in the exercise of First Amendment rights of freedom of speech and association described above. In order to finance these activities, the Plaintiff political action committees solicit voluntary contributions from a variety of individual sources. The funds realized from this solicitation activity constitute the primary source of revenue for these committees. Moreover, the ability of, and the extent to which, the political action committees are able to contribute to candidates for federal offices and to otherwise engage in protected First Amendment activity is directly related to the extent to which they can solicit contributions. The solicitation activities of the Plaintiffs are non-partisan in nature and are directed to the dissemination of ideas, opinions, and political information about matters of vital national and regional concern. The scope of Plaintiffs' solicitation activities has been drastically curtailed by certain provisions of the Act.

16. Defendant, the Federal Election Commission, was established by the Federal Election Campaign Act of 1971 (as amended in 1974) (2 U.S.C. § 437c) and the Federal

Election Campaign Act Amendments of 1976, to administer, obtain compliance with, and formulate policy with respect to those Acts and Chapters 95 and 96 of the Internal Revenue Code of 1954. (2 U.S.C. § 437c) (1976).

17. Defendant, Francis R. Valeo, is the duly appointed Secretary of the United States Senate and is, pursuant to the Federal Election Campaign Act Amendments of 1976, an *ex officio* member of the Federal Election Commission. The instant case is brought against Mr. Valeo solely in his official capacity as a member of the Commission.

18. Defendant, Edward Henshaw, is the Clerk of the United States House of Representatives and is, pursuant to the Federal Election Campaign Act Amendments of 1976, an *ex-officio* member of the Federal Election Commission. The instant case is brought against Mr. Henshaw solely in his official capacity as a member of the Commission.

19. Defendant, Vernon Thomson, is the Chairman of the Federal Election Commission. The instant case is brought against Mr. Thomson solely in his official capacity as a member of the Commission.

20. Defendant, Thomas E. Harris, is the Vice-Chairman of the Federal Election Commission. The instant case is brought against Mr. Harris solely in his official capacity as a member of the Commission.

21. Defendants, Neil Staebler, William Springer, Robert O. Tiernan, and Joan D. Aikens, are Commissioners of the Federal Election Commission. The instant case is brought against them solely in their official capacities as members of the Commission.

22. Defendant, Griffin Bell, the Attorney General of the United States of America, is charged under the Federal

Election Campaign Act Amendments of 1976 with the enforcement of certain penal provisions of the Act. Additionally, the Attorney General is empowered to receive reports of apparent violations of the Act from the Commission and to take appropriate action. 2 U.S.C. § 437g *et seq.* (1976).

COUNT I

1-22. As paragraphs 1-22 of Count I, Plaintiffs reallege and incorporate paragraphs 1-22 of the Complaint.

23. Prior to the time the Act became effective on May 11, 1976, one or more of the Plaintiffs had solicited contributions from various employees of its member corporations and from individuals who were not employees of a corporate member. These solicitations were conducted without having obtained prior approval from their corporate members.

24. Section 441b(b)(4)(D) of the Act prohibits a trade association or its political action committee from soliciting contributions from any person unless that person is either a stockholder or an executive or administrative employee of the member corporation. Moreover, § 441b(b)(4)(D) allows such solicitation only "to the extent that it has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one trade association in any calendar year."

25. The ability of the Plaintiffs to communicate with members of the electorate and to provide a focal point for political association among various individuals is in large measure, if not completely, dependent on their ability to solicit contributions from a broad spectrum of the electorate. Additionally, the ability of the Plaintiffs to promul-

gate their views on matters of vital political issues is dependent upon their ability to solicit contributions from interested members of the electorate at large.

26. By depriving Plaintiffs of the ability freely to solicit contributions from a broad spectrum of the electorate, § 441b(b)(4)(D) abridges Plaintiffs' ability to communicate political thoughts and information. And by interposing a prior restraint even on those statutorily permissible communications, § 441b(b)(4)(D) has seriously and profoundly abridged Plaintiffs' rights of freedom of speech and association as well as the rights of their members and the rights of people with similar or related interests to receive from the Plaintiffs communications expressing political views and containing political ideas.

27. The harm wrought by § 441b(b)(4)(D) is actual and not speculative or hypothetical. For example, in 1977, BreadPAC, on at least twenty-seven separate occasions, has been refused permission by ABA-member corporations to solicit contributions from their executive and administrative personnel (and their families). Of the twenty-seven refusals, nine were predicated on the fact that prior approval had already been given to some other trade association's political action committee. The remaining corporate refusals to permit BreadPAC solicitation were predicated largely on the ABA-member corporation's undifferentiated aversion to solicitation activities. While a number of corporations have given their approval to BreadPAC to solicit executive and administrative corporate personnel, thirty corporations have limited the scope of their consent to a miniscule number of specific individuals in the managerial hierarchy while refusing permission to solicit the overwhelming majority of otherwise statutorily permissible solicitees.

28. Likewise, RPAC, also fearing the imposition of civil and criminal sanctions, has ceased soliciting contributions from a large number of individuals whom it formerly solicited with success. This cessation of activity stemmed from § 441b(b)(4)(D)'s prohibition against solicitation of any individual lacking the requisite statutory relationship to a member corporation. Additionally, RPAC has ceased solicitations in the absence of corporate consent even though prior to the enactment of § 441b(b)(4)(D), it had successfully conducted solicitations without such consent.

29. Although RPAC has made numerous prior requests to member corporations for consent to solicit contributions from their executive and administrative personnel, a substantial number, if not the majority, have failed to make any timely response. Consequently, RPAC's solicitation efforts have been seriously curtailed.

30. LuDPAC has experienced similar difficulties. Indeed, so grave have these difficulties proved themselves to be, that LuDPAC has been compelled to abandon almost all solicitation activities.

31. 2 U.S.C. § 441b(b)(4)(D) is an unconstitutional abridgment of Plaintiffs', their members' and their members' employees' rights of freedom of speech and association in that:

(a) By conditioning Plaintiffs' right to communicate on corporate consent, § 441b(b)(4)(D) imposes a prior restraint on the expression of political thoughts and ideas;

(b) Section 441b(b)(4)(D) constitutes an impermissible burden on the right of the Plaintiffs to solicit contributions, thereby resulting in an improper restraint on Plaintiffs' rights to communicate with members of the electorate;

(c) Section 441b(b)(4)(D), by restricting the class of permissible solicitees to stockholders and executive and administrative personnel (and families) of member corporations, impermissibly interdicts Plaintiffs from having the opportunity to associate with anyone other than those defined in the Act;

(d) Section 441b(b)(4)(D) deprives Plaintiffs of the right to freely associate with large segments of the electorate who have or may have an affinity of interest with Plaintiffs, and it prevents that segment of the electorate from having the opportunity to associate with Plaintiffs toward common political ends;

(e) Section 441b(b)(4)(D)'s restriction that only one trade association can solicit the stockholders and executive and administrative personnel of a given member corporation impermissibly and absolutely restricts the communication of political expression by any and all other trade associations and impermissibly curtails the right of Plaintiffs and large segments of the electorate to freely associate with each other.

(f) By impermissibly circumscribing Plaintiffs' solicitation activities, § 441b(b)(4)(D) abridges Plaintiffs' ability to make statutorily permissible contributions to candidates of its choice.

WHEREFORE, Plaintiffs respectfully pray for entry of judgment declaring 2 U.S.C. § 441b(b)(4)(D) unconstitutional in violation of the First Amendment to the Constitution of the United States. Plaintiffs also pray for entry of judgment permanently enjoining the enforcement of 2 U.S.C. § 441b(b)(4)(D).

COUNT II

1-22. As paragraphs 1-22 of Count II, Plaintiffs incorporate and reallege paragraphs 1-22 of Count I.

23. In the alternative, even if the Court concludes that it is permissible to condition Plaintiffs' solicitation activities on each individual member corporation's consent, 2 U.S.C. § 441b(b)(4)(D) nonetheless violates the First and Fifth Amendments in that it is impermissibly vague and fails to provide objective criteria which are to be applied in determining whether or to what extent consent should be granted.

WHEREFORE, Plaintiffs respectfully request entry of judgment declaring 2 U.S.C. § 441b(b)(4)(D) unconstitutional in violation of the First and Fifth Amendments to the Constitution of the United States. Plaintiffs also respectfully request entry of judgment permanently enjoining the enforcement of 2 U.S.C. § 441b(b)(4)(D).

COUNT III

1-22. As paragraphs 1-22 of Count III, Plaintiffs incorporate and reallege paragraphs 1-22 of Count I.

23. Sections 441b(b)(4)(A) and (B) of the Act provide, in essence, that labor union political action committees may solicit the union membership with unlimited frequency and without obtaining prior consent from any third person. Similarly, the political action committees of membership organizations (such as the American Trial Lawyers Association, the Association of Life Underwriters, etc.), and the political action committees of corporations (other than trade associations) may solicit, with unlimited frequency and without prior consent, the membership and the executive and administrative personnel (and their families). Finally, corporations may solicit, twice yearly by mail, all non-executive or administrative employees and, perhaps more importantly, labor organizations may solicit, twice yearly by mail, all executive or administrative employees and all shareholders of those corporations with which they have collective bargaining agreements.

24. 2 U.S.C. § 441b(b)(4)(D) imposes substantially dissimilar restrictions on Plaintiffs in that they cannot, under any circumstances, solicit their members' non-executive or non-administrative personnel (or their families), and they cannot solicit executive or administrative personnel without the prior consent of a member corporation which has not given previous consent to another trade association.

25. But for the restrictions imposed by § 441b(b)(4)(D), and their fear of the Act's civil and criminal sanctions, the Plaintiffs would, as they have in the past, engage in substantially more expanded solicitation activities than they are presently conducting.

26. Section 2 U.S.C. §441b(b)(4)(D) arbitrarily, capriciously, and invidiously discriminates against trade association political action committees in violation of the Fifth Amendment to the Constitution of the United States.

WHEREFORE, Plaintiffs respectfully request entry of judgment declaring 2 U.S.C. § 441b(b)(4)(D) unconstitutional in violation of the Fifth Amendment to the Constitution of the United States. Plaintiffs also pray for judgment permanently enjoining the enforcement of 2 U.S.C. § 441b(b)(4)(D).

COUNT IV

1-22. As paragraphs 1-22 of Count IV, Plaintiffs incorporate and reallege paragraphs 1-22 of Count I.

23. 2 U.S.C. §§ 441b(a) and (b)(2) prohibit trade associations from unilaterally making independent contributions of funds, voluntarily contributed from individuals, to express their opinion about the fitness, *vel non*, of a candidate for federal office or to express, in connection with any federal election, their views on matters of politi-

cal importance unless such communications are addressed solely to their own executive and administrative personnel.

24. But for the restrictions imposed by § 441b and their fear of the civil and criminal sanctions imposed by the Act, Plaintiffs would make such expenditures for the promulgation of political thought and political ideas.

25. Sections 441b(a) and (b)(2) constitute an unconstitutional abridgment of Plaintiffs' First Amendment rights of freedom of speech and association.

WHEREFORE, Plaintiffs respectfully pray for judgment declaring 2 U.S.C. §§ 441b(a) and (b)(2) unconstitutional in violation of the First Amendment to the Constitution of the United States. Plaintiffs also respectfully pray for judgment permanently enjoining the enforcement of 2 U.S.C. §§ 441b(a) and (b)(2).

COUNT V

1-22. As paragraphs 1-22 of Count V, Plaintiff, LuDPAC, incorporates and realleges paragraphs 1-22 of Count I of the Complaint.

23. The Act does not define the phrase "trade association" as used in 2 U.S.C. § 441b(b)(4)(D). Consequently, LuDPAC is unable to ascertain whether, for purposes of the restrictions on solicitation contained in § 441b(b)(4)(D) of the Act, the range of statutorily permissible solicitees includes only the executive and administrative personnel of NLBMDA's thirty corporate-trade association members or whether it includes the administrative and executive personnel of the corporate members which constitute the membership of NLBMDA's corporate-trade association members or both.

24. As a result of the Act's vagueness, and fearing the Act's civil and criminal penalties, LuDPAC has refrained from engaging in solicitation activities.

WHEREFORE, Plaintiffs, NLBMDA and LuDPAC, pray for judgment declaring 2 U.S.C. § 441b(b)(4)(D) of the Act unconstitutional in violation of the First and Fifth Amendments to the Constitution of the United States. Plaintiffs also pray for judgment permanently enjoining enforcement of 2 U.S.C. § 441b(b)(4)(D).

Respectfully submitted,

/s/ *Jerome H. Torshen*
Jerome H. Torshen

/s/ *Jeffrey Cole*
Jeffrey Cole

/s/ *Richard J. Carmel*
Richard J. Carmel

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Washington, D.C. 20062

§441b. Contributions or expenditures by national banks, corporations or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or for any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section, and section 12(h) of the Public Utility Holding Company Act (15 U.S.C.

79*l*(h)), the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include--

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) non-partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job

discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written

solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, for soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

§441c. Contributions by Government contractors

(a) It shall be unlawful for any person—

(1) who enters into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof or for selling any land or building to the United States or any de-

partment or agency thereof, if payment for the performance of such contract or payment for such material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for and the later of—

(A) the completion of performance under; or

(B) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land or building,

directly or indirectly to make any contribution of money or other things of value, or to promise expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use; or

(2) knowingly to solicit any such contribution from any such person for any such purpose during any such period.

(b) This section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any separate segregated fund by any corporation or labor organization, membership organization, cooperative, or corporation without capital stock for the purpose of influencing the nomination for election, or election, of any person to Federal office, unless the provisions of section 441b prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, such fund. Each specific prohibition, allowance, and duty applicable to a corporation, labor organization, or separate segregated fund under section 441b applies to a corporation, labor

Answer to Complaint

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Civil Action No. 77 C 947

BREAD POLITICAL ACTION COMMITTEE, et al.,
Plaintiffs

v.

THE FEDERAL ELECTION COMMISSION, et al.,
Defendants

ANSWER

Defendant Federal Election Commission, et al., answers the numbered paragraphs of the complaint as follows:

1. Defendant admits allegations 1 and 2.

2. Defendant denies allegation 3 and reasserts the arguments set forth in the Motion to Dismiss.

3. Defendant denies allegation 4 and reasserts the arguments set forth in the Motion to Dismiss.

4. Defendant admits allegation 5 but avers that the review procedures set forth in 2 U.S.C. §437h are not available here and reasserts its arguments set forth in the Motion to Dismiss.

5. Defendant admits that plaintiff BreadPAC is registered with the Federal Election Commission, and is without knowledge or information sufficient to form an opinion as to the truth of the balance of allegation 6.

6. Defendant is without knowledge or information sufficient to form an opinion as to the truth of allegation 7.

7. Defendant is without knowledge or information sufficient to form an opinion as to the truth of allegation 8, but avers that the phrase "identified individuals acting on their own behalf" affords an identification of solicitees that is factually inadequate as regards the application of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §431 *et seq.*, (hereinafter the "Act"), and further avers that contributions made to individual "candidates for Federal office whose views are most harmonious with the goals of BreadPAC and the ABA" are not non-partisan.

8. Defendant is without knowledge or information sufficient to form an opinion as to the truth of so much of allegation 9 as asserts the purposes of plaintiff National Restaurant Association.

9. Defendant is without knowledge or information sufficient to form an opinion as to the truth of allegation 10.

10. Defendant admits that plaintiff Restaurateurs Political Action Committee is registered with the Federal Election Commission, and is without knowledge or information sufficient to form an opinion as to the truth of the balance of allegation 11.

11. Defendant is without knowledge or information sufficient to form an opinion as to so much of allegation 12 as asserts the federated nature and the purposes and activities of plaintiff National Lumber and Building Materials Dealers Association.

12. Defendant is without knowledge or information sufficient to form an opinion as to the truth of allegation 13.

13. Defendant admits that plaintiff Lumber Dealers Political Action Committee is registered with the Federal

Election Commission, and is without knowledge or information sufficient to form an opinion as to the truth of the balance of allegation 14.

14. Defendant is without knowledge or information sufficient to form an opinion as to the truth of so much of allegation 15 as asserts the primary source of committee revenue, the identity of solicitees, and the voluntariness of their contributions. Defendant denies the balance of allegation 15 and disputes the characterization as First Amendment activities of all the activities described in plaintiffs' allegations 1 through 14.

15. Defendant admits allegation 16.

16. Defendant admits at the time of the filing of the complaint, F. R. Valeo was the Secretary of the Senate, but avers that, since that time, J. S. Kimmitt has succeeded him in that post.

17. Defendant admits allegation 18.

18. Defendant admits that, at the time of the filing of the complaint, Vernon W. Thomson was the Chairman of the Federal Election Commission and avers that, since that date, Thomas E. Harris has succeeded him in that post, and that Mr. Thomson remains a member of the Commission.

19. Defendant admits that, at the time of the filing of the complaint, Thomas E. Harris was Vice Chairman of the Commission and avers that, since that date, Mr. Harris has assumed the post of Chairman.

20. Defendant admits allegation 21 and avers that, since the time of the filing of the complaint, Joan D. Aikens has assumed the post of Vice Chairman of the Commission.

21. Defendant admits so much of allegation 22 as asserts that the Attorney General is empowered to take appropriate action on referrals of apparent statutory violations by the Federal Election Commission, but avers that enforcement of the Act falls within the primary jurisdiction of the Commission.

COUNT I

22. Defendant is without knowledge or information sufficient to form an opinion as to the truth of allegation 23.

23. Defendant denies that allegation 24 accurately states the statutory proscription. Section 441b(b)(4)(D) permits trade associations a limited exception to the general rule that corporation funds cannot be used to solicit contributions to a political committee which supports federal candidates.

24. Defendant is without knowledge or information sufficient to form an opinion as to the truth of allegation 25.

25. Defendant denies allegation 26.

26. Defendant denies allegation 27, restates the assertions made in paragraph 23, *supra*, page 4, and avers that, under plaintiffs' own allegations, factors other than the prohibitions of any provision of the Act operated to restrict plaintiff BreadPAC's solicitation of the executive and administrative personnel of certain corporations.

27. Defendant is without knowledge or information sufficient to form an opinion as to the truth of allegation 28 and restates the assertions made in paragraph 23, *supra*, page 4.

28. Defendant is without knowledge or information sufficient to form an opinion as to the truth of allegation 29.

29. Defendant is without knowledge or information sufficient to form an opinion as to the truth of allegation 30.

30. Defendant denies allegation 31 and restates the assertions made in paragraph 23, *supra*, page 4.

COUNT II

31. Defendant denies allegation 23, page 12 of the complaint.

COUNT III

32. Defendant denies so much of allegation 23, page 13 of the complaint, as asserts that (1) the political action committees of corporations may solicit, "with unlimited frequency and without prior consent," their "membership," and (2) corporate trade associations may not solicit their executive and administrative personnel (and their families) "with unlimited frequency and without prior consent," and admits the balance of allegation 23.

33. Defendant restates the assertions set forth in paragraph 23, *supra*, page 4, and admits, as respects allegations 24, page 13 of the complaint, that the Act makes unlawful the solicitation by a trade association of its member corporations' non-executive and non-administrative personnel (or their families) and the solicitation of its member corporations' executive or administrative personnel without the member corporations' specific approval, and avers that such restrictions upon trade associations use and transfer of corporate general treasury money are substantially consistent with those of the restrictions alleged in plaintiffs' allegation 23, page 13, of the complaint which are admitted by defendant.

Answer to Complaint

34. Defendant restates the assertions set forth in paragraph 23, *supra*, page 4, and is without knowledge or information sufficient to form an opinion as to the truth of allegation 25, page 14 of the complaint.

35. Defendant denies allegation 26, page 14 of the complaint.

COUNT IV

36. Defendant denies allegation 23, page 14 of the complaint, and avers that the Act permits a trade association to make contributions from its separate segregated fund to candidates, candidates' authorized committees or national political party committees, and to use its general treasury funds to communicate with its own executive and administrative personnel.

37. Defendant is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegation 24, page 15 of the complaint.

38. Defendant denies plaintiffs' allegation 25, page 15 of the complaint.

COUNT V

39. Defendant admits so much of plaintiffs' allegation 23, page 15 of the complaint, as asserts that the Act does not define the phrase "trade association," and is without knowledge or information sufficient to form a belief as to the truth of the balance of plaintiffs' allegation 23, page 15.

40. Defendant denies plaintiffs' allegation 24, page 16 of the complaint.

AFFIRMATIVE DEFENSES

1. This court lacks subject matter jurisdiction over the complaint.

2. Section 441b(a)(4)(D) of the Act imposes no prior restraint upon the exercise of rights protected by the First Amendment of the Constitution.

3. Section 441b of the Act is constitutional in all respects.

/s/ William C. Oldaker

WILLIAM C. OLDAKER
General Counsel

/s/ Charles N. Steele

CHARLES N. STEELE
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/s/ Joan Bernott

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77C947

BREAD POLITICAL ACTION COMMITTEE, et al.,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,

Defendants.

MOTION FOR LEAVE TO AMEND THE COMPLAINT

Plaintiffs, by their attorneys, Jeffrey Cole and Stanley T. Kaleczyc, move for entry of an order allowing Plaintiffs to Amend the Complaint as follows:

1. Delete the entire second sentence of Paragraph 9 and in its place insert the following:

> "Formed in March 1939, its corporate purposes are to unite organizations and persons engaged in the foodservice industry or related activities in the United States in the furtherance by all proper and legitimate agencies and means of the following purposes and objects:
>
> (a) To maintain a high standard of integrity and efficiency in the conduct of the business of the foodservice industry.

(b) To foster and promote a feeling of fraternity and goodwill among its members and to advance on broad equitable lines the welfare of the foodservice industry.

(c) To maintain the foodservice industry among the respected professions and industries.

(d) To oppose improper methods and unethical practices inimical to the right conduct of business so that honorable and fair competition may prevail.

(e) To promote harmonious relations with allied industries in order that food products may be sold to consumers at the lowest possible cost.

(f) To assist in the enactment and enforcement of local, state, and federal pure food and sanitation laws.

(g) To disseminate useful information and inspire members to educate themselves in the scientific and practical features of their business.

(h) To encourage the participation of its members in community and civic activities.

(i) To hold annually, when practicable, in conjunction with its convention as an education feature, an exposition or exhibition of equipment, supplies, and so forth, necessary in conducting the business of the foodservice industry.

(j) To direct leadership in national affairs pertaining to the foodservice industry and to act as spokesman for state and local associations whose members are engaged in the foodservice industry and who have authorized the National Restaurant Association to represent them in federal matters.

(k) To unite with organizations engaged in the food-service industry in Canada, Mexico, and other countries in the furtherance of communications, industry cooperation, and fellowship.

2. Delete the first sentence of Paragraph 10 and in its place insert the following:

"The NRA is composed of approximately 10,000 member firms, both corporate and non-corporate."

3. Add to Paragraph 31 of Count I, the following:

"(g) Neither §441(b)(4)(D) nor any other provision or the Act defines the term solicitation, and individuals of ordinary intelligence cannot ascertain its meaning. Consequently, §441b(b)(4)(D) is unconstitutionally vague."

"(h) Section 441b(b)(4)(d) is unconstitutionally overbroad in that it includes activities which are protected by the First and Fifth Amendments."

Respectfully submitted,

/s/ Jeffrey Cole
Jeffrey Cole

OF COUNSEL:
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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CIVIL ACTION NO. 77 C 947

BREAD POLITICAL ACTION COMMITTEE, et al.,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,
Defendants.

ANSWER TO PLAINTIFFS' AMENDMENTS TO THEIR COMPLAINT

Defendant Federal Election Commission ("Commission") answers the amended paragraphs to the complaint as follows:

1. Defendant is without knowledge or information sufficient to form an opinion as to the truth of so much of the amended allegation 9 as asserts the purposes of the plaintiff National Restaurant Association.

2. Defendant is without knowledge or information sufficient to form an opinion as to the truth of the amended allegation 10.

3. Defendant denies amended allegation 31 of Count I.

Respectfully submitted,

/s/ William C. Oldaker
William C. Oldaker
General Counsel

/s/ Charles N. Steele
Charles N. Steele
Associate General Counsel

/s/ Lawrence M. Noble
Lawrence M. Noble
Attorney

/s/ Patricia F. Bak
Patricia F. Bak
Attorney

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
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Certificate of Service

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS
EASTERN DIVISION

CIVIL ACTION NO. 77 C 947

BREAD POLITICAL ACTION COMMITTEE, et al.,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,
Defendants.

CERTIFICATE OF SERVICE

This is to certify that I caused to be served by first-class mail, postage prepaid on May 31, 1979, a copy of the Defendant Federal Election Commission's Answer to Plaintiff's Amendments to Their Complaint to the following counsel:

Jeffrey Cole, Esq.
180 N. La Salle Street
Suite 3100
Chicago, Illinois 60601

Thomas P. Sullivan, Esq.
United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604

Stanley T. Kaleczyc, Jr.
1615 H Street, N.W.
Washington, D.C. 20062

/s/ Phyllis C. Baytop
Phyllis C. Baytop

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION NO. 77 C 947

BREAD POLITICAL ACTION COMMITTEE, et al.,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,
Defendants.

FINDINGS OF FACTS

1. Most trade associations are incorporated.

2. The members of trade associations are business associations involved with broadly similar commodities, products and services and who have common and mutual political, economic and social interests. Depending on the industry in question and the policy of the trade association, many, if not most, members of trade associations are incorporated.

3. Federated associations are made up of members who are trade associations rather than business firms. The constitutent associations may be regional associations, or they may be associations whose membership is drawn from different product groups within a generic industry. Most federated associations are incorporated. Most members of federated associations are incorporated. (Hereinafter the term trade association shall include federated associations).

Findings of Fact

4. The principal functions of a trade association or a federated association are providing the membership with the support, information and other aid that will enable the members to strengthen their position in the society and to effectively advocate their interests. To these ends, trade associations and federated associations undertake such activities as government relations, lobbying, public relations, education, information dissemination, advertising, research, standardization and statistics.

5. The activities of trade associations consist, in part, of providing to members information concerning how proposed and enacted legislation, regulations, and other governmental actions affect their business and how the members can participate in the legislative process. Trade associations also present the members' views to legislators and regulators, and sometimes to the public, in order that the members' views regarding the drafting and enactment of legislation, regulations and other government actions can be taken into consideration.

6. The activities of trade associations include, but are not limited to: lobbying on specific legislation; presenting testimony to legislative committees; presenting testimony to administrative agencies; preparing comments on proposed regulations for submission to administrative agencies; meeting with regulators and legislators to present the industry's viewpoint on specific matters; informing the membership of the existence of issues or pending legislation or regulations.

7. In general, the associations obtain their funds for most of the activities they undertake from fees, dues and other assessments paid by the membership who receive the services of the association.

Findings of Fact

8. Trade associations, including some federated trade associations, have established and pay the administration and solicitation expenses of separate segregated funds ("political action committees" or "political committees") pursuant to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* The administration and solicitation expenses of these committees may be paid for from the general treasury of the association, which money comes primarily from membership dues.

9. In many instances, business corporations belong to numerous trade associations which advocate views and provide services for the different business concerns which the corporations have.

10. According to Federal Election Commission* Disclosure Series No. 8: Corporate-Related Political Committees Receipts and Expenditures, 1976 Campaign, September 1977, as of January 1, 1975, there were 89 political committees registered as connected to corporations. These reports also show that between January 1, 1975 and May 10, 1976, 208 committees connected to corporations registered with the Commission; that between May 11, 1976 (which was the effective date of the 1976 amendments to the Act) and December 31, 1976, 153 political committees connected to corporations registered with the Commission. Between January 1, 1975 and December 31, 1976, the political committees connected to corporations had gross receipts of $6,782,322 and expenditures of $5,803,415.

11. According to published figures compiled by the Commission which were released on January 24, 1979, in

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* Referred to interchangably with "FEC" or "Commission".

the 1977-1978 campaign (from January 1, 1977, through November 27, 1978) there were 837 active political committees connected to corporations. These figures also show that the adjusted receipts (transfers made from affiliated committees after October 23, 1978 are not included) for these political committees was $17.1 million; adjusted disbursements (transfers to affiliated committees after October 27, 1978 are not included) for these political committees was $15.3 million and contributions to federal candidates made by these committees totaled $8.9 million (not including contributions made after October 23, 1978).

12. According to the figures compiled by the Commission based on reports filed with the Commission, as of December 31, 1976, there were 211 political committees connected to trade associations registered with the Commission; between January 1, 1977 and December 31, 1977, 51 additional political committees connected to trade associations registered with the Commission; between January 1, 1978 and December 31, 1978, 79 additional political committees connected to trade associations registered with the Commission, and that between January 1, 1979 and March 31, 1979, 11 additional political committees connected with trade associations registered with the Commission.

13. According to the figures compiled by the Commission and based on reports filed with the Commission, between January 1977 and March 1979, political committees connected to trade associations had gross receipts of $10,112,364 and made contributions totalling $5,908,245.

14. Published figures compiled by the Commission which were released on January 24, 1979, also show that two trade associations are among the top 10 non-party political committees in terms of gross receipts (minus transfers in from affiliated committees), gross disbursements (minus

transfers to affiliated committees) and total amount of cash contributed to candidates for the period from January 1, 1977 to November 27, 1978.

15. Published figures compiled by the Commission which were released on January 24, 1979, also show that between January 24, 1977 and November 27, 1978, all non-party political committees raised $77.3 million and spent $75.6 million.

16. According to Federal Election Commission Disclosure Series No. 10: Labor-Related Political Committees Receipts and Expenditures, 1976 Campaign, January 1978, as of January 1, 1975, there were 201 political committees connected to labor organizations registered with the FEC. Between January 1, 1975 and May 10, 1976, 63 additional committees connected to labor organizations registered with the Commission; between May 11, 1976 (which was the effective date of the amendments to the Act) and December 31, 1976, 33 additional political committees connected to labor organizations registered with the Commission. Between January 1, 1975 and December 31, 1976, the political committees connected to labor organizations had gross receipts of $20,578,524 and expenditures of $20,326,500.

17. According to the figures compiled by the Commission based on reports filed with the Commission, between January 11, 1975 and December 31, 1976, there were 230 political committees registered with the Commission which were connected to the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), its affiliates, and related unions.

18. According to the figures compiled by the Commission and based on reports filed with the Commission, be-

tween January 1, 1975 and December 31, 1976, political committees connected with the AFL-CIO and its affiliates (excluding committees connected to AFL-CIO related unions) had gross receipts of $15,137,818, and gross expenditures of $15,361,303. The AFL-CIO itself made contributions totalling $935,723.

19. According to published figures compiled by the Commission which were released on May 9, 1979, in the 1977-1978 campaign (from January 1, 1977, through December 31, 1978) there were 280 active political committees connected to labor organizations. These figures also show that the adjusted receipts for these political committees was $19.8 million; adjusted disbursements for these political committees was $18.9 million and contributions to federal candidates made by these committees totaled $10.3 million.

20. Published figures compiled by the Commission which were released on January 24, 1979, also show that two labor organizations are among the top 10 non-party political committees in terms of gross receipts (minus transfers in from affiliated committees) and gross disbursements (minus transfers to affiliated committees). Six labor organizations are among the top 10 non-party political committees in terms of total amount of cash contributed to candidates for the period from January 1, 1977 to November 27, 1978. These figures also show that between January 1, 1977 and November 27, 1978, all non-party political committees raised $77.3 million and spent $75.6 million.

21. Membership in American labor unions declined by 767,000 or 3.8% between 1974 and 1976. Total union membership dropped from 20.2 million in 1974 to 19.4 million in 1976. Union membership as a percentage of the total labor force has been declining steadily in recent years, dropping from 21.7% in 1974 to 20.1% in 1976.

Findings of Fact

In 1975, the toal number of individuals who owned shares of stock in American corporations was 25,270,000.

22. According to published figures compiled by the Commission which were released on May 9, 1979, in the 1977-1978 campaign (from January 1, 1977, through December 31, 1978) there were 254 non-connected political committees (i.e., political committees which are independent of any other organizations). These figures also show that the adjusted receipts for these non-connected political committees was $15.4 million; adjusted disbursements for these political committees was $16.8 million and contributions to federal candidates made by these committees totaled $2.5 million.

23. Published figures compiled by the Commission which were released on January 24, 1979, also show that four unconnected political committees are among the top 10 non-party political committees in terms of gross receipts (minus transfers in from affiliated committees) and gross disbursements (minus transfers to affiliated committees).

24. The National Lumber and Building Material Dealers Association ("NLBMDA") is a federation of twenty-seven (27) local, state and regional associations (hereinafter referred to as the "federateds"), which in turn represent 15,000 retail lumber and building material dealers across the nation (hereinafter referred to as "retail dealers"). These retail dealers are not members of the NLBMDA. Incorporated and existing pursuant to the laws of the State of Illinois, NLBMDA is devoted to analyzing and resolving business problems of the lumber and building material industry.

25. The federated members of the NLBMDA, as well as many of the retail dealers are incorporated. The NLBMDA does not know how many retail dealers are

incorporated since it does not maintain any records regarding the form of organization of the retail dealers. Maintained in the membership records of NLBMDA is information regarding the dues structure of the federateds and the identity of each federated's president, national directors and the dates of their respective conventions.

26. A substantial number of the federated members of the NLBMDA belong to one or more trade associations. Retail dealers also typically belong to one or more trade associations, including but not limited to:

a. National Forest Products Association

b. National Association of Homebuilders

c. American Retail Federation

d. Local, state, regional or national Chamber of Commerce

27. The NLBMDA does not possess precise information regarding the extent to which federated members belong to one or more other trade associations, nor does the NLBMDA possess precise information regarding the extent to which retail dealers belong to one or more other trade associations.

28. In 1969, in a survey conducted by the NLBMDA, 27 percent of the retail dealers who responded stated that they were members of one or more other trade association other than the federateds.

29. In addition, retail dealers may belong to more than one federated member of NLBMDA. Because NLBMDA does not maintain any roster of the membership of its federated members, NLBMDA is not aware of the number of retail dealers who hold multiple membership in federateds.

Findings of Fact

30. The NLBMDA is governed by the Board of Directors, which is composed of two persons selected by each of the federated members, the past two national presidents, the officers of the Association, the chairman of the Legislative and Government Agency Affairs Advisory Committee and the chairman of the Industrial Development Division Advisory Committee. Each federated member has total autonomy in the selection of the two individuals who will represent the federated on the NLBMDA Board.

31. The officers of NLBMDA which are elected by the Board of Directors, are the Chairman of the Board of Directors, the President, the First Vice-President, the Second Vice-President, the Third Vice-President, the Secretary, the Treasurer, and the Executive Vice-President. With the exception of the Executive Vice-President, who is the chief salaried employee of the Association, the members of the Board of Directors receive no compensation from the NLBMDA for their service on the Board. The Board normally meets two (2) times each year, although the by-laws only provide for an annual meeting of the Board.

32. The Executive Committee of the NLBMDA, which is elected by the Board of Directors, is charged with the responsibility of overseeing the operations of the Association between meetings of the Board of Directors. The recommendations of the Executive Committee are ultimately decided upon and implemented by the Board of Directors. The executive Committee meets at the call of the President or upon the written request of 3 of its members, with no required minimum number of meetings per year.

33. With the exception of the Executive Vice-President as stated in paragraph 31, *supra*, no compensation is paid by NLBMDA to members of the Executive Committee for services which they perform.

Findings of Fact

34. The officers are selected once a year by vote of the membership of the Association as represented by the Board of Directors, subsequent to nomination by a Nominating Committee. The Nominating Committee is composed of individuals representing retail dealers and past presidents of NLBMDA. The chairman and members of the Nominating Committee are selected by the President of the NLBMDA.

35. Within the Board of Directors, votes of the federated members are weighted. The formula for the weighing of votes is grounded upon the number of retail dealers within each federated. As illustrated by the following table, there is a direct relationship between the size of federated's membership and the number of votes which each federated has on the Board.

NLBMDA BOARD OF DIRECTORS WEIGHTED VOTING FORMULA — 1978

	NUMBER OF RETAIL DEALERS IN EACH FEDERATED ASSOCIATION	NUMBER OF FEDERATEDS IN EACH CATEGORY	NUMBER OF VOTES
(1)	1-75	0	2
(2)	75-125	6	4
(3)	126-300	7	7
(4)	201-300	4	7
(5)	301-400	3	8
(6)	401-500	0	*
(7)	501-600	2	13
(8)	601-700	1	15
(9)	701-800	1	18
(10)	800+	3	20

* Since there are no federateds in this category, it is not possible to calculate the exact number of votes which any federated in that category would have.

Findings of Fact

36. NLBMDA has two operating divisions: the Legislation and Governmental Agency Affairs Division ("L&GAA") and the Industrial Development Division ("IDD"). It is through these two Divisions that services are provided by NLBMDA.

37. The L&GAA Division, has within its purview the overseeing of all legislative activities of the Association, as well as all regulatory agency developments which may affect the industry.

38. The L&GAA Advisory Committee oversees the operations of the L&GAA Division. This Committee is comprised of eleven (11) persons: eight (8) managing officers of federated members, the chairman of the IDD Advisory Committee, a Vice President who serves as liaison to the officers of the Association, and the President of the Association, who is an *ex officio* member of the Committee. As provided in the by-laws, the managing officers who are members of this Committee are selected by the President of the NLBMDA from a slate of candidates proposed for selection by a group consisting of all federated managing officers before or during the Annual Meeting of the Board of Directors.

39. The other committees within the L&GAA Division are the Codes Committee, which deals with codes and building standards, and special study committees which are convened from time-to-time.

40. The IDD provides retail dealer-oriented business management education services. The IDD Advisory Committee oversees the operation of this Division. Other committees within the Division include the Marketing and Merchandising Committee, the Business Management Committee, the Research and Development Committee, the

Transportation and Materials Handling Committee, and the Manufacturers' Council.

41. The special services provided by the NLBMDA to its members include the following:

a. Legislation and government agency affairs activities

b. Maintaining liaison with other national organizations

c. Annual convention

d. Annual legislative meeting

e. Educational publications

42. In effectuating its corporate purposes, the NLBMDA, *inter alia,* informs and attempts to mobilize its federated members with regard to a variety of issues before Congress and regulatory agencies.

The identification and selection of those issues which are of concern to lumber and building material dealers is achieved by consideration of the views of the NLBMDA federated members and their retail dealer members, communicated directly to the NLBMDA or through the various committees of the NLBMDA.

43. The NLBMDA also finances through registration fees and dues an annual legislative meeting in the Spring for members. At the legislative meeting, those in attendance participate in briefings conducted by the NLBMDA staff and others concerning pending or proposed legislative and regulatory matters of concern to the industry, and are encouraged to meet independently with their congressional delegations to discuss these matters and any other topics of personal concern to the attendees.

Findings of Fact

44. In addition, the NLBMDA finances from dues the publication and distribution of "Washington Update" which is a legislative newsletter of the L&GAA Division. "Washington Update" is circulated to approximately 178 persons including, but not limited to, the 27 managing officers of the federateds, past presidents of the NLBMDA, members of the trade press, former Executive Vice-Presidents of the Association, certain association colleagues and several corporate representatives.

45. A second newsletter, "Dealer", which addresses industrial and technical concerns, has a circulation of approximately 500. It is provided to retail dealers who contribute specifically to the IDD Division.

46. For each of the years 1974-1978, the NLBMDA was directly interested in an average of twenty (20) pieces of legislation.

47. The NLBMDA has employed one part-time consultant who spends an average of 30 hours per week on Association affairs and whose duties include lobbying. He is a registered lobbyist on behalf of the Association. This individual reports to the staff Vice-President for Legislative and Regulatory Agency Affairs and to the Executive Vice-President.

48. The NLBMDA finances the preparation and presentation of its members' views to congressional committees on legislation and issues of interest to the NLBMDA. In addition, the NLBMDA finances the presentation of its views through direct communications with congressional staff people. NLBMDA testimony to committees of the Congress is typically presented by members of the Association who are accompanied by NLBMDA staff.

Findings of Fact

49. The NLBMDA finances the preparation and presentation of its views to administrative agencies on issues of importance to the NLBMDA. The NLBMDA's views are presented to administrative agencies through the filing of comments on rulemaking, testifying at administrative hearings and other contacts with the agencies. In undertaking these activities, the NLBMDA has employed two in-house staff persons and has hired outside consultants.

50. The approximate budgets of the NLBMDA for the years indicated is as follows:

	TOTAL BUDGET	L&GAA DIVISION BUDGET
1974	313,000	168,000
1975	327,000	174,000
1976	359,000	189,000
1977	384,000	200,000
1978	423,000	218,000
1979	456,000	228,000

51. LuDPAC is the separated segregated fund established in January 1976 and administered by the NLBMDA. LuDPAC is duly registered with the Federal Election Commission.

In June, 1976 LuDPAC ceased the solicitation and making of contributions and expenditures.

52. NLBMDA pays the costs of administration and solicitation of voluntary contributions to LuDPAC.

53. As reflected in the by-laws of LuDPAC, the purposes of LuDPAC are to aid by campaign contributions those publicly announced candidates for reelection to the Senate or to the House of Representatives, who support the principles of private enterprise and sound government

fiscal and monetary policies, and who are supportive of the objectives of the industry.

54. In order to effectuate its purposes, LuDPAC is dependent upon the receipt of voluntary contributions which it uses to make contributions to candidates for Federal office. For example, the original January 1976 By-Laws of LuDPAC provided as follows:

> "Eligibility for active membership shall be available to all businessmen, employees, professionals and others in the retail lumber and building material distribution industry including those directly or indirectly associated with lumber and building material production and distribution, home building, mortgage lending, community development, building and construction, and related industry activities."

Any individual who contributed $100 or more to LuDPAC was a member for the calendar year in which the contribution was made.

55. In the Spring of 1976, prior to May 11, LuDPAC undertook its one and only campaign to solicit voluntary contributions. This solicitation consisted of the following:

a. The Chairman of LuDPAC spoke at a meeting of the Board of Directors of the NLBMDA at which some 70 persons were present. He spoke about LuDPAC, its purposes, and goals, and its importance to the industry and the political process. He also encouraged participation in LuDPAC.

b. The Chairman of LuDPAC spoke at the NLBMDA Legislative Conference at which approximately 500 persons, the majority of whom were retail dealers, were present. He spoke about LuDPAC, its purposes and goals, and its importance to the industry and the political process. He also encouraged the audience to participate in LuDPAC by joining as members of LuDPAC.

c. LuDPAC sent a mailing to the then 30 managing officers of the federated members of NLBMDA which requested that they distribute to their dealer members the solicitation pamphlets of LuDPAC.

d. LuDPAC sent a mailing of approximately 8,000 LuDPAC solicitation pamphlets to those managing officers of the federated members who, in response to the request detailed above, had agreed to distribute LuDPAC pamphlets to their retail dealer members.

56. Thus, the major solicitation activity of LuDPAC, prior to May 11, 1976, was directed to the retail dealers who are members of the various federated associations, whose membership records are not maintained by either NLBMDA or LuDPAC.

57. LuDPAC has no record of how many retail dealer members received the LuDPAC pamphlet, nor does LuDPAC know how many were actually solicited for voluntary contributions to LuDPAC.

58. After the effective date of the 1976 Amendments to FECA* acting upon the advice of counsel, believing that it was not able to determine which persons, if any, LuDPAC could solicit pursuant to those Amendments, other than the approximately 40 executive or administrative personnel of the federated members, and fearing the imposition of civil and criminal penalties for any violation of the Act, LuDPAC ceased all solicitation activities, including the distribution of the LuDPAC solicitation pamphlet. And, no solicitation activities have been undertaken by LuDPAC since that time, nor has LuDPAC made any contributions to candidates since October 29, 1976. LuD-

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* "Federal Election Campaign Act," "FECA" and "Act" are used interchangably herein.

PAC has, however, continued to be registered with the FEC and has filed the requisite reports pursuant to the FEC's regulations.

59. LuDPAC has not requested an Advisory Opinion from the FEC concerning whom they could solicit, nor has LuDPAC done so since the commencement of this action.

60. As a result of the limited solicitation activities undertaken, LuDPAC received voluntary contributions totaling $8,750 in 1976. Contributions to federal candidates and other expenditures by LuDPAC in 1976 totaled $6,234. In 1977, LuDPAC reported no receipts and $60 in disbursements. In 1978, LuDPAC reported no receipts and $88 in disbursements.

61. The solicitation activities, which LuDPAC had terminated upon the advice of counsel and in the belief that it was not able to determine which persons, if any, it could solicit pursuant to the Act (other than the approximately 40 executive or administrative personnel of the federated members), would be resumed. Specifically, LuDPAC would solicit the retail dealers who are members of the federated members of the NLBMDA.

62. In addition, but for the prohibitions contained in Act, the LuDPAC would also solicit all persons attending the annual convention of the NLBMDA, which is attended by the trade press, manufacturers, and other persons who are neither retail dealers nor executive or administrative personnel of the federated members. And, but for the Act, LuDPAC would also solicit contributions from those persons who are neither retail dealers nor executive or administrative personnel of the federated members, who are identified in the original By-laws of LuDPAC as set forth in paragraph 54 *supra*.

Findings of Fact

63. LuDPAC does not know the exact number of persons whom it would solicit, but it estimates the number to be approximately 15,000.

64. In addition, LuDPAC has been informed by eight (8) of its largest federated members who collectively have more than 4,300 retail dealers as their members that, but for the Act, they would supply their respective membership rosters of retail dealers to LuDPAC in order that LuDPAC may undertake solicitation activities directed to the members of the federated members.

65. LuDPAC is governed by a Board of Trustees. The members of the Board of Trustees are presently the five individuals originally appointed by the President of NLBMDA, as the members of the committee which was charged with the responsibility of establishing and organizing LuDPAC.

66. The selection of candidates for federal office who received contributions from LuDPAC was made by the Board of Trustees, acting upon the recommendations and suggestions provided by individual members of the Board of Trustees themselves, the managing officers of the federated associations, and retail dealer and the officers of NLBMDA.

67. The National Restaurant Association ("NRA") is a not-for-profit corporation incorporated pursuant to the laws of the State of Illinois and having its headquarters and executive offices in Chicago, Illinois. Formed in March 1919, its corporate purposes are, *inter alia:*

a. to maintain a high standard of integrity and efficiency in the conduct of the business of the food service industry.

b. to foster and promote a feeling of fraternity and goodwill among its members and to advance on broad equitable lines the welfare of the food service industry.

c. to maintain the food service industry among the respected professions and industries.

d. to oppose improper methods and unethical practices inimical to the right conduct of business so that honorable and fair competition may prevail.

e. to promote harmonious relations with allied industries in order that food products may be sold to consumers at the lowest possible cost.

f. to assist in the enactment and enforcement of local, state, and federal pure food and sanitation laws.

g. to disseminate useful information and inspire members to educate themselves in the scientific and practical features of their business.

h. to encourage the participation of its members in community and civic activities.

i. to hold annually, when practicable, in conjunction with its convention as an education feature, an exposition or exhibition of equipment, supplies, and so forth, necessary in conducting the business of the food service industry.

j. to direct leadership in national affairs pertaining to the food service industry and to act as spokesperson for state and local associations whose members are engaged in the food service industry and who have authorized the National Restaurant Association to represent them in federal matters.

k. to unite with organizations engaged in the food service industry in Canada, Mexico, and other coutries in the furtherance of communications, industry cooperation, and fellowship.

Findings of Fact

68. The NRA has three principal missions: to represent the food service industry, to educate the food service industry, and to promote the food service industry. All the activities of the NRA are designed to effectuate one or more of these missions, all of which, taken together, constitute the services provided to the members of the Association.

69. The following are the categories of membership in the NRA:

a. food service operators

b. suppliers of food, goods or services to the industry

c. persons retired from active service in the industry

d. not-for-profit organizations engaged in food service

e. students in a food service curriculum

f. faculty members in a food service curriculum

g. foreign business organizations which are involved in the industry.

70. The Membership Committee of the NRA may recommend to the Board of Directors of the Association changes in the membership categories. If the Board of Directors approves such changes, they must then be approved by the general membership of the NRA at the annual meeting.

71. Except for foreign business organizations, of which there are approximately 400, only the organizational members of the NRA have voting privileges in the Association, including, but not limited to, the right to vote on all by-laws, changes proposed at the annual meeting of the NRA. All members are entitled to all the services of the NRA, except that foreign business organizations do not have

access to the government affairs services of the Association.

72. The growth in membership of the NRA from 1974 to 1979 has been:

1974	5075 members
1975	5249 members
1976	6508 members
1977	7509 members
1978	9313 members
1979	10,080 members

73. As reflected in the membership information in the possession of the NRA, the vast majority of NRA members are small business organizations. Approximately 95% of the members of the NRA have annual sales of less than $500,000; the Small Business Administration classifies as a small business any food service operator which, during the preceding 3 fiscal years, had average annual receipts of no more than $5.5 million. 13 C.F.R. § 121.3-8 (1978) The NRA does not know the exact number of its members which are small businesses.

74. Based upon its general knowledge of the industry, NRA knows a substantial number of the organization members of the NRA belong to one or more trade associations other than the NRA. The NRA does not know the exact number of its members which belong to one or more other trade associations.

75. In 1976, in a survey conducted by the NRA, of those responding 0.5 percent of the organization members of the NRA said they were members of no other trade associations; 11 percent said they were members of one other association; 31 percent said two; 27 percent said three; and 31 percent said four or more.

Findings of Fact

In 1977, of those responding, 1 percent said they were members of no other trade or professional associations; 7 percent said one; 31 percent said two; 31 percent said three; and 31 percent said four or more.

In 1978, of those responding, 1% said they belonged to no other trade or professional associations; 11 percent said one; 28 percent said two; 27 percent said three; and 33 percent said four or more.

The results of these surveys comprise the only statistical information regarding how many members of NRA belong to other trade or professional associations.

76. Among the other trade associations to which NRA members also belong are:

a. State Restaurant Associations

b. Chamber of Commerce of the United States

c. American Hotel and Motel Association

d. National Federation of Independent Businessmen

e. International Franchise Association

Each of the trade associations enumerated above are independent, autonomous organizations which are not members of the NRA.

77. The dues structure of the NRA is based upon the following criteria:

a. food service operators pay on the basis of food and beverage volume done;

b. suppliers of food, goods or services pay on the basis of volume of business done with the industry;

c. persons retired from active service in the industry pay the minimum dues; $75.00 per year;

d. not-for-profit organizations pay on the basis of volume of business done;

e. students in a food service curriculum pay $10.00 per year;

f. faculty members in a food service curriculum pay $25.00 per year;

g. foreign business organizations pay the minimum dues for organization members ($75.00).

78. In order to determine the amount of dues paid by organization members, the NRA does maintain records regarding this criterion. The NRA does not maintain any records regarding the form of organization of its business members. Accordingly, the NRA does not know how many of its business organization members are corporations, partnerships or sole proprietorships.

79. Further, because the NRA does not maintain any records concerning the form of organization of its business members, the NRA does not know how many persons hold shares of stock in its corporate members. Nor does the NRA know how many persons employed by its member corporations are executive or administrative personnel of those corporations, as those terms are defined in the Federal Election Campaign Act, as amended. 2 U.S.C. § 431 *et seq.*

80. The NRA is governed by a Board of Directors comprised of sixty (60) individuals who represent the food service industry on a geographic basis and on the basis of the type of organizations operated. This ensures that the number of members of the Board of Directors from any geographic area will reflect the size of the NRA membership in that area, and that multi-state food service organizations will also be represented on the Board.

Findings of Fact

81. Members of the Board of Directors receive no compensation from the NRA for their services on the NRA Board, which meets a minimum of four (4) times per year. The Board of Directors is the policymaking body of the NRA.

82. The term of office for a member of the Board of Directors is three (3) years. Any member of the Board of Directors may serve a maximum of three (3) terms.

83. The members of the Board of Directors are nominated by a nominating committee that is composed of members of the Board of Directors. The nominating committee is composed of the immediate past president of the NRA, the immediate past chairman of the nominating committee, and three other members of the Board of Directors appointed by the President of the NRA. The nominations are placed before the Board of Directors for approval. If approved, they are placed before the membership of the NRA at the annual meeting of the Association where they are voted upon and accepted or rejected.

84. As provided in the By-laws of the NRA, members of the Board of Directors must be actively employed in the food service industry in a food service organization, excluding suppliers, manufacturers and other allied members of the industry. The organization which employs the individual must be a member of the NRA.

85. Neither the Board of Directors of the NRA, nor any committee of the Board of Directors of the NRA, nor any other committee of the NRA has any governing responsibilities with relation to the Restaurateurs' Political Action Committee ("RPAC"). RPAC is governed by a Board of Trustees (See 112).

Findings of Fact

86. In addition to the Board of Directors, there are approximately sixteen (16) committees of the NRA whose function is to recommend policies to the Board of Directors of the NRA. The members of these various committees are recommended to the Board of Directors by the President of the NRA; these recommendations may be either approved or disapproved by the Board.

87. The Government Affairs Committee of the NRA is responsible for recommending policy decisions to the Board of Directors regarding the congressional and federal agency activities of the Association, serving as a liaison between the Association and its members and the federal government. The Government Affairs Committee is composed of approximately forty (40) persons who are members or employees of members of the NRA and are selected by the President of the NRA, subject to the approval of the Board of Directors.

88. The Education Committee of the NRA has within its purview the responsibility of generally overseeing the education activities of the Association with its members. The Education Committee is composed of approximately thirty (30) persons who are members or employees of members of the NRA and are selected by the President of the NRA, subject to the approval of the Board of Directors.

89. Implementation of the policies recommended by the Committees of the NRA and adopted by the Board of Directors is achieved through the staff of the Association, working in conjunction with the members.

90. The Government Affairs Department of the NRA is composed of approximately ten (10) staff persons. This Department is specifically responsible for conducting the

congressional and federal agency activities of the Association, serving as a liaison between the Association and its members and the federal government and generally effectuating those policy recommendations of the Government Affairs Committee which are adopted by the Board of Directors of the NRA.

91. In furtherance of these activities, during each of the years, 1976, 1977, 1978, NRA testified before congressional committees approximately twenty (20) separate times. At present, the NRA employs four (4) people who are registered lobbyists and whose job it is to present the NRA's views to congressmen, senators and their staff on specific matters of importance to the NRA and its members. Additionally, the NRA presents the views of its members to executive departments and administrative agencies on matters of importance to the members of the NRA.

92. More generally, the NRA engages in and finances through membership dues activities directed at the dissemination of the views of its members regarding matters of concern to the NRA's membership, such as pending and enacted legislation and public policy issues. To this end, the NRA publishes weekly and monthly reports, letters and brochures. The monthly report is the "NRA News" which reports on all the activities of the Association. The weekly publication is the "NRA Washington Report" which is published on the average of four times a month. Three of the four issues discuss pending public policy issues of importance to the membership; the fourth issue is devoted to a discussion of general economic trends related to the industry. Approximately 20,000 copies of the "NRA" Washington Report" are distributed each week by the NRA. The NRA continuously publishes for its members brochures and prepares letters which contain general

information on the activities of the Association. In addition, to communicate its position on the minimum wage issue, in 1978 the NRA paid for an advertisement concerning this subject in the Washington Post. This is the only time that the NRA has taken out an advertisement in a publication of general circulation concerning pending or proposed legislation.

93. The approximate budgets of the NRA for the years indicated are as follows:

Year	*Total Budget*	*Governmental Affairs Department*
1974	3,500,000	276,000
1975	3,400,000	349,000
1976	4,500,000	549,000
1977	4,900,000	715,000
1978	6,300,000	918,000

94. The Restaurateurs' Political Action Committee ("RPAC") the separate segregated fund of the National Restaurant Association ("NRA"), was organized in 1963 to protect and promote the interests of the food service industry by supporting candidates to the United States Congress who recognize the need for fiscal integrity and the worth and importance of the free enterprise system. NRA pays the costs of administration of and solicitation of voluntary contributions to RPAC.

95. In order to finance these activities, RPAC has solicited voluntary contributions from a number of individdual sources. In 1975 RPAC solicited persons directly or indirectly involved in the food services industry. These persons were typically acquaintances of members of the Board of Directors of the NRA and were solicited without regard to whether such persons or their employers were

members of the NRA, without regard to whether such persons were executive or administrative personnel of member companies.

96. For the calendar years 1968-1977 inclusive, these solicitation activities took the form of inviting persons to buy tickets to attend a banquet held in conjunction with the May annual meeting of the NRA. The form of the verbal invitations depended on the person who made the solicitation, and there was no particular prescribed format. These solicitations involved speaking to prospective contributors to RPAC about what it was RPAC stood for and what its goals were.

97. In 1975, people who were employees of NRA member companies as well as those who were neither members of NRA or executive or administrative personnel of a member company, were solicited to give to RPAC.

98. In 1976, the scope of permissible solicitees was defined by the 1976 Amendments to the Federal Election Campaign Act, specifically § 441b(b)(4)(D). By virtue of the Act, NRA's Board of Directors after May 11, 1976 no longer solicited persons in the manner they previously had.

99. In 1977, subject to the limitations imposed by the Act, RPAC attempted to solicit voluntary contributions via the medium of the sale of tickets ($100 per ticket) to a banquet held in conjunction with the May 1977 annual meeting of the NRA. RPAC has no records of how many people were solicited or how many could have been solicited under the provisions of the Act.

100. In addition, in 1977 RPAC also initiated a general direct mailing to the membership of the NRA which sought permission to solicit voluntary contributions to RPAC.

When and if such permission was granted, a mailing was then sent which solicited voluntary contributions to RPAC. This mailing included a brochure which discussed both RPAC's activities and the importance of RPAC to the industry and to the political process. In addition, some request for individual contributions were made by telephone.

101. The 1977 requests for permission to solicit were sent to 7,509 members of the NRA: 1,087 gave permission to solicit individuals for voluntary contributions; 6,422 denied permission either explicitly or by failure to respond. RPAC has no record of how many failed to respond versus how many specifically denied permission.

102. In complying with the requirements imposed by the Act, RPAC encountered substantial difficulties in selling tickets to the 1977 fundraising banquet. First, because the Act requires that prior permission be obtained from each corporate member of the NRA before RPAC can solicit any executive or administrative personnel of the member company for a voluntary contribution to RPAC, no solicitations could be made by individuals acting on behalf of RPAC until the written responses granting permission were obtained by RPAC. Only at that time—and not before that time—could RPAC inform those individuals (all of whom were members of the Board of Directors of the NRA) who had agreed to make solicitations that they could commence those activities, but only with those individuals whose employers had given the requisite prior permission. This necessitated RPAC's providing to volunteer solicitors a list of whom the solicitor could legally contact. RPAC also advised these solicitors that they were not permitted to solicit voluntary contributions from any other member of the NRA or executive or administrative employees of the NRA corporate member. Some members

of the NRA who had, prior to the effective date of the 1976 Amendments to the Act, sold tickets to the banquet now refused to do so, stating to Brian Harron, Executive Vice-President of NRA, that the restrictions imposed by the Act and their fear of the civil and criminal penalties imposed by the Act made them unwilling to participate in the solicitation activities. Both the number of persons from whom voluntary contributions were solicited and the number of solicitors decreased. RPAC does not know the exact number of persons who were no longer solicited or the exact number of persons who no longer would act as solicitors.

103. In addition, approximately 100,000 individuals attended the 1977 NRA convention, during which event the RPAC banquet was scheduled to be held. Because more than 80,000 of those persons were neither members of the NRA nor executive or administrative personnel of NRA members, and because only 1,087 members of the NRA had given the requisite prior permission, RPAC did not attempt to identify those individuals in attendance at the convention who could be legally solicited by RPAC.

104. Because of the difficulties set forth above which RPAC experienced in its attempts to comply with the requirements imposed by the 1976 Amendments to the Act, and fearing the sanctions imposed by the Act for violations of the Act, the Board of Trustees of RPAC abandoned the fundraising banquet in 1978. Solicitation activities for 1978 took the form of a direct mail campaign, supplemented by a telephone solicitation program. At the May 1978 annual meeting of the NRA, attended by approximately 100,000 persons who are directly or indirectly (i.e., suppliers, consultants, faculty members) involved in the

food services industry, RPAC conducted no solicitation activities.

105. In conducting its direct mail campaign for calendar year 1978, RPAC, on December 31, 1977, placed in the mail 7,509 communications to all of the members of the NRA requesting permission to solicit voluntary contributions from persons who normally receive NRA services, shareholders and executive or administrative personnel of member organizations. On April 1, 1978, an additional 8,250 communications to all of the members of the NRA requesting permission to solicit voluntary contributions from the shareholders and executive and administrative personnel of member organizations were placed in the mail.

106. In response to these requests for permission to solicit, 1,168 business organizations granted permission to solicit in 1978. These organizations provided permission to RPAC to solicit contributions from 3,196 individuals. Contributions to RPAC were received from 393 persons. RPAC does not know the exact number of persons from whom it could have solicited contributions had all the requests for permission been granted.

107. In 1979 RPAC has undertaken a similar direct mail campaign, supplemented by telephone communications. As of August 31, 1979 RPAC has already, on three separate occasions, mailed information brochures containing information requesting permission to solicit contributions from shareholders, executive and administrative personnel of member organizations to the more than 10,000 members of the NRA. In addition, RPAC has also sent a special mailing to the members of the Board of Trustees of RPAC whose organizations have not given permission

to solicit. RPAC also plans to send a special mailing to the members of the Board of Directors of the NRA whose organizations have not given permission to solicit. RPAC also plans to communicate by telephone with approximately 2,000 member organizations of the NRA which have not yet granted permission to solicit.

Additionally, in conjunction with the annual convention of the NRA held in May, RPAC invited the 352 organizations which had granted prior permission to attend a special reception sponsored by RPAC and held exclusively for NRA members. Attendees at this reception met Col. Harlan Sanders, at which time the purposes and goals of RPAC and RPAC's importance to the political process were discussed.

108. But for the prohibitions, restrictions, and sanctions contained in the 1976 Amendments to the Act, RPAC would have directly solicited voluntary contributions from each of the approximately 100,000 persons who attended the 1979 annual meeting of the NRA. However, because of the prohibitions, restrictions, and sanctions contained in the Act, RPAC was able to solicit contributions only from those executive and administrative personnel who are employed by an NRA member or the shareholder of an NRA member and their respective families, provided that the member had given prior permission or gave permission at the convention. RPAC does not know the total number of individuals from whom it would solicit contributions, but that number is at least 100,000.

109. Col. Harlan Sanders, the founder of Kentucky Fried Chicken is a revered and respected figure in the restaurant industry. He is both active in the affairs of the NRA and RPAC and had been involved in RPAC's

solicitation activities. His presence at NRA conventions has always created interest and the Colonel is a sought after figure at the conventions. In 1979, the Colonel, acting at RPAC's request and on its behalf, desired to solicit those attending the convention by telling them about RPAC, its goals and why he thought RPAC is important. However, fearing the restrictions imposed by the Act, the Colonel did not engage in the above activity except with those with whom prior permission had been granted.

110. RPAC has not sought an Advisory Opinion from the Commission concerning the proposed activities of Col. Sanders, nor has it done so since the commencement of this action.

111. RPAC has been denied permission to solicit by some of its members because they had given permission to another trade association. RPAC does not know the number of members who denied permission for this reason in 1977 or 1978. For the year 1979, as of August 30, 1979, of the 163 members which have specifically denied permission, 47 have denied for this reason.

112. The activities of RPAC are governed by a Board of Trustees, composed of ten (10) individuals selected by the President of the NRA, who are employees of members of the NRA. The members of the Board of Trustees are not paid for their services. The Board of Trustees meets approximately four (4) times per year. Included among the activities of the Board of Trustees is the selection of candidates to whom RPAC contributions will be made.

113. In selecting those candidates to whom RPAC will make contributions, the factors which the Board of Trustees consider include, but are not limited to, the candidates' allegiance to the free enterprise system, voting records on

particular issues, the State from which the candidate comes, the prognostication as to the probability that the candidate will be elected, and the degree to which a particular race is critical to the industry.

114. In addition to the Board of Trustees, four (4) individuals employed by the NRA are involved in the operation of RPAC. These persons implement the policies and decisions of the RPAC Board of Trustees and carry out the ministerial functions required to be fulfilled by the Act and regulations promulgated thereunder.

115. The reports filed by RPAC with the Commission show that in 1975 RPAC reported receipts of $36,485 and expenditures of $33,560; in 1976 RPAC reported receipts of $45,890 and expenditures of $55,845; in 1977 RPAC reported receipts of $36,672 and expenditures of $16,315 and in 1978 RPAC reported receipts of $40,106 and expenditures of $75,620. (These figures are taken from reports filed with the Commission by RPAC which are on the public record.)

116. Bread Political Action Committee ("BreadPAC") is a separate segregated fund established in 1974 by the American Bakers' Association ("ABA") and is duly registered with the Federal Election Commission. The costs of solicitation of voluntary contributions to BreadPAC, as well as legal expenses incurred in the administration of BreadPAC, are paid by the Political Education Committee of the ABA.

117. The Political Education Committee whose overhead expenses are paid for by the ABA is a separate fund of the ABA which accepts voluntary contributions from the member companies of the ABA for the purpose of furthering the political education activities of the ABA, as

described more fully hereinafter, and for paying those costs related to BreadPAC's operations described in paragraph 116 above.

118. BreadPAC has, since its inception, engaged in telephone, direct mail, and face to face solicitations of contributions to be used by BreadPAC for the purpose of influencing federal elections. In addition, in 1975 and 1976, BreadPAC had regional dinners described more fully hereinafter at paragraph 122.

119. The ABA maintains a mailing list of its members. This list contains the names of the members and the names of certain employees who are of the rank of plant manager or above, and who are designated by their companies to receive ABA services.

120. Prior to May 11, 1976, BreadPAC solicited both individuals who were employed by members of the ABA, and also individuals not employed by members of the ABA who were involved in the baking industry.

121. BreadPAC does not know the precise number of individuals who were solicited prior to May 11, 1976; however, BreadPAC does know that at least all persons whose names were on the mailing list of the ABA and designated to receive services from the ABA were solicited for voluntary contributions to BreadPAC. Prior to May 11, 1976 BreadPAC also solicited an unknown number of people who were not designated to receive ABA services and who were not on the mailing list of ABA.

122. In addition, prior to May 11, 1976 BreadPAC held two regional dinners, one each in 1975 and 1976. Invited to the regional dinners and in attendance at the dinners were both ABA members and non-members who were in-

volved in the baking industry. The operating costs for these dinners were paid by the Political Education Committee of the ABA. The ticket price for attendance at each dinner was $100 per couple which was a contribution to BreadPAC.

123. Prior to May 11, 1976, BreadPAC also engaged in solicitation activities at both the Spring and Fall meetings of the ABA. At these meetings, which were closed to the general public and open only to members and others ABA identified as engaged in activities related to the baking industry, BreadPAC solicited everyone who attended these conventions for contributions. As each individual came to the registration desk, he or she was solicited by BreadPAC. The solicitation process consisted of asking the person to attend a $100 per couple reception at which there would be a speaker and occasionaly entertainment. The speaker was always a senator, congressman, or other governmental official who spoke on issues of importance to the baking industry. BreadPAC also engaged in telephone and mail solicitation activities in conjunction with these meetings. BreadPAC has no information on the exact number of persons who were solicited prior to May 11, 1976 at the Spring and Fall Meetings of the ABA.

124. After May 11, 1976, the effective date of the 1976 Amendments to the Act, BreadPAC requested permission from the ABA members to solicit the executive and administrative personnel of each member. Prior to the FEC Amendments, BreadPAC had never requested permission to solicit and had conducted its solicitations without any prior approval.

125. BreadPAC did not attempt to obtain permission to solicit the stockholders of ABA members because most

of the companies in the industry are small family-owned businesses where the executive and administrative personnel are in fact in most cases the principal stockholders. There are only a few companies that are publicly owned.

126. BreadPAC does not know the exact number of executive and administrative personnel employed by members of the ABA, nor does BreadPAC know the precise number of ABA members which are publicly owned or how many shareholders those member companies have.

127. From May 11, 1976, through December 31, 1976, BreadPAC solicited contributions from all the persons it could have solicited contributions from with the requests that were granted.

128. In 1976, approximately 16% of those members asked for permission to solicit expressly refused permission and approximately 30% failed to respond to the request. In 1977, approximately 11% of those members asked for permission to solicit expressly refused permission and approximately 39% failed to respond to the request; and, in 1978, approximately 6% of those members asked for permission to solicit expressly refused permission and approximately 59% failed to respond to the request.

129. Of those ABA members which had declined permission to solicit, some refused to allow permission and stated that it was because they felt that granting permission to BreadPAC would require granting permission to the Red Cross, the Cancer Fund and the United Way. BreadPAC does not know the exact number of persons who gave these reasons for refusing permission to solicit.

130. Some ABA members have refused to give permission to solicit because of their fear and general apprehension about being involved in the whole political fund

area due to the Watergate scandal. BreadPAC does not know the exact number of persons who gave this reason for refusing permission to solicit.

131. Some ABA members have refused to give permission to solicit because they had already given prior permission to another trade association to conduct solicitation activities during the same calendar year.

132. At each of the Spring and Fall meetings of the ABA held subsequent to May 11, 1976, BreadPAC did not, because of the Act, solicit any executive or administrative personnel of a corporate member which had not given prior permission. For purposes of those solicitation activities, all of the approximately 350 ABA members were treated as incorporated, although fewer than 20 are not incorporated. BreadPAC did not determine with absolute certainty which members were not incorporated because (1) fearing the imposition of civil or criminal penalties in the event that executive or administrative personnel of an incorporated member were impermissibly solicited, BreadPAC wanted to be absolutely certain of the status of each member before it would have communicated directly with executive or administrative personnel of a non-corporate member; and, (2) the only way to ensure which members did not utilize the corporate form required that each of the approximately 350 members of the ABA be contacted personally by a member of the BreadPAC staff, a task which would involve a substantial commitment of staff and other resources.

BreadPAC has developed an elaborate system to assure compliance with the FECA and Regulations at ABA meetings. Prior to each meeting, the staff reviews all

registration envelopes and marks each one with the appropriate designation:

- a white dot for those who have authorized solicitation;
- a red dot for those who have denied permission to solicit;
- a dollar sign for those who have previously contributed and should be given tickets for the reception;
- no mark for those who have not responded to the solicitation authorization.

When these individuals come to the registration desk to pick up their envelopes, the ABA staff person asks him or her whether he or she is authorized to give permission to solicit on behalf of the company. If he or she responds affirmatively then the ABA staff person requests authorization. If the response is negative, the ABA staff person immediately terminates discussion of BreadPAC.

133. At the Board of Governors' meetings at both the Spring and Fall meetings of the ABA, BreadPAC made a report to the Board of its activities. Prior to making the reports, BreadPAC's treasurer requested that everyone not authorized to be solicited leave the room. This was done pursuant to FEC Advisory Opinion 1976-27. This procedure, and others required by Advisory Opinion 1976-27, has been and are being followed by the ABA at all its meetings to the present, and was employed at the ABA's most recent meeting in April 1979.

134. During the summer of 1976, BreadPAC spent virtually its entire time trying to explain to the members of the ABA the requirements of FECA and trying to get

permission to solicit. Thus, BreadPAC did very little actual soliciting prior to the Fall 1976 ABA meeting.

135. Compliance with the Act's restrictions on BreadPAC's solicitation activities has resulted in increased costs and has imposed an additional administrative burden on BreadPAC. For example, in January of each year, BreadPAC sends out approximately 350 separate requests for permission to solicit. In February, a second request is sent to all those who did not respond to the first request. In preparation for the Spring ABA meeting, BreadPAC must go through all of the solicitation authorization records to put the appropriate sticker on a registrant's envelope. After the Spring meeting, BreadPAC sends its first mail solicitation. To do this, except in those few instances in which a member provides BreadPAC with a specific list of permissible solicitees, BreadPAC must cull out from the membership records of the ABA the names of the administrative and excutive personnel of members who have given prior permission to solicit. This process must again be repeated both for the Fall meeting of the ABA and for the Fall mail solicitation, taking into account any additional grants of permission to solicit which BreadPAC may receive from ABA members after the first mail solicitation.

136. This same process detailed in paragraph 135 above, must be repeated anew every year since the Act requires annual renewal of authorization.

137. In addition, because BreadPAC has a policy not to solicit any individual for the remainder of the calendar year once he has contributed $200.00, BreadPAC culls his name from its records.

Findings of Fact

138. The number and amount of contributions to BreadPAC have not varied greatly when a non-election year is compared with the immediately following election year. See Plaintiff's Exhibit 1-26.

139. The reports filed with the Commission by BreadPAC show that in 1975 it reported gross receipts of $40,190 and made expenditures of $13,551.46, in 1976 it reported receipts of $38,712 and expenditures of $58,157, in 1977 it reported receipts of $28,000 and expenditures of $9,000, and in 1978 it reported receipts of $29,550 and expenditures of $43,750.

140. If the Act's restrictions on trade association solicitation activities contained in 2 U.S.C. § 441b(b)(4)(D) did not exist, BreadPAC, without obtaining anyone's prior permission would request contributions to BreadPAC from: all the executive and administrative personnel of ABA's members, both baker and allied members; and, all those people identified by the ABA as persons who are involved with the baking industry regardless of whether those persons were affiliated with an ABA member. In addition, BreadPAC would mail informational literature to such individuals in advance of both the Spring and Fall meetings of the ABA, as well as in advance of the Quandrennial Exposition of the ABA described more fully hereinafter. This informational literature, if it could be sent, would announce the existence of BreadPAC, its purposes, goals and its opinion as to the importance of individuals' voluntarily associating together and contributing money to candidates for Federal office who believe in the private enterprise system and whose election would be in the best interest of the industry and would solicit voluntary contribution to BreadPAC. These pieces of information

literature would not espouse the election of any particular named candidate.

141. Every four years, the ABA and the Bakery Equipment Manufacturer's Association sponsor an Exposition which historically has been attended by approximately 20,000 people. The last such Exposition was held in 1977 and there were approximately 20,000 people in attendance. Each person who attends the Exposition is involved in the baking industry since it is only open to such people.

142. At this Exposition, it is required that each person in attendance register. Thus, the ABA and BreadPAC have immediate access to these people's names and addresses, and BreadPAC would, but for the restrictions contained in 2 U.S.C. § 441b(b)(4)(D), solicit each of these people without obtaining prior permission and regardless of whether that person was an administrative or executive employee of an ABA member company. This solicitation, if allowed, would be by direct contact at the Exposition as well as by prior mail solicitation.

143. At the ABA Quadrennial Exposition in 1977, BreadPAC did not engage in unrestricted solicitation as it wanted to. BreadPAC's solicitation activities at this show were the same as its solicitation activities at its annual Fall and Spring meetings described earlier.

144. Since § 441b(b)(4)(D) restricts trade associations from soliciting any executive or administrative personnel for whom solicitations by another trade association had been previously authorized by the member corporation within the calendar year, and therefore the member company could not legally authorize BreadPAC to make such solicitations, BreadPAC has not, since May 11, 1976, know-

ingly solicited such persons since it could not receive authorization. But for these restrictions, BreadPAC would engage in such solicitations.

145. In 1976 and in 1978 BreadPAC lacked funds to contribute to as many candidates as it wanted (or in the amounts it wanted) and to as many candidates as made requests to it for contributions.

146. After BreadPAC made its first contributions in 1974, it decided to carry over some funds from each campaign to finance operations early in the following year, before the first fundraiser in the Spring of the next year. Thus in 1975, BreadPAC had a carryover of about $1,700.

147. After the enactment of the 1976 FECA Amendments, the Board of Directors of BreadPAC decided to increase the carryover to approximately $10,000. This was done because the Board was apprehensive about BreadPAC's ability to raise substantial funds under the new law. The Board wanted to assure that BreadPAC would have ample funds to sustain its activities, if the restrictions on solicitation resulted in significantly reduced contributions.

148. In 1978, the Board once again decided to increase the BreadPAC carryover, due to the formation of BakePAC, the PAC of the Independent Bakers Association, in June. The Board recognized that BreadPAC's authorizations, and hence its contributions, would probably be still further reduced by the establishment of this competing PAC. Accordingly, BreadPAC's carryover was raised to about $14,000. The Board believed this would be a prudent sum in view of the likelihood of further decreases in contributions to BreadPAC.

Findings of Fact

149. At the end of March 1974, the ABA Executive Committee made the decision to establish BreadPAC. The ABA Executive Committee is *not* the chief governing Board of the ABA. It is responsible for the day-to-day operations of the Association.

150. Prior to the creation of BreadPAC, there was considerable discussion among ABA's members about the decision to establish it; and, in the days preceding the Executive Committee meeting where the decision was ratified, there were discussions with many members of the ABA. No formal vote was ever taken of the membership regarding the establishment of BreadPAC.

151. BreadPAC has a twelve member Board composed of eight baker members and four supplier (viz. allied) members. The BreadPAC Board is "self-perpetuating," selecting Board members and a Chairperson biannually. Vacancies within the term are filled by the Chairperson. This board has the ultimate decision making authority regarding BreadPAC's operations. The Board meets at least twice a year or more often if circumstances require it.

152. The BreadPAC Board makes its decisions by voting, and each member of the Board has the same vote. The Board is concerned with solicitation of contributions, making of contributions, and actions by the FEC which would affect BreadPAC's operations.

153. In deciding to which candidates for federal office BreadPAC should contribute, the Board employs five criteria: closeness of the race; the candidates' need for the money; the candidates' voting record on issues of importance to the industry; the candidates' committee position, if any; and the overall attitude toward the aims of the industry.

Findings of Fact

154. Information about the candidates is obtained from a variety of sources, including information volunteered to BreadPAC from ABA members. Other sources of information include the Republican and Democratic House and Senate Campaign Committees, political newsletters, people in the States where the elections are taking place and the leading newspapers of those states.

155. BreadPAC, and not the ABA, informs contributors (i.e., executive and administrative personnel of member companies) of election campaign activities generally, including the philosophies of the candidates; and, in particular, BreadPAC informs its contributors of the election campaign activities of candidates who are sympathetic to the interests of the baking industry and who share the industry's approach to governmental responsibilities.

156. The principal governing board of the ABA is the Board of Governors composed of one member and one alternate member from each ABA member. Other than membership in the ABA, there are no qualifications for membership on the Board of Governors. Thus, there are approximately 350 governors and 350 alternates. The daily operation and decisions on routine policy matters are conducted by the Executive Committee.

157. Each member of the ABA determines who it will have representing it on the Board of Governors, and each Governor serves on the Board until replaced by the particular ABA member. The Board meets at least twice a year, and each baker member has voting privileges. Each allied or supplier member is entitled to fully participate in Board meetings but they are not entitled to vote on matters which come before the Board.

Findings of Fact

158. Neither the Board of Governors nor any other board or committee of the ABA has any governing responsibilities with respect to BreadPAC.

159. The ABA is an open association in that any member who wants to can belong to practically any committee with the exception of the Executive Committee and the Exposition Committee, which manages the ABA Quadrennial Exposition.

160. The ABA is an incorporated trade association which is comprised of approximately 359 businesses, organizations and has a twelve person staff.

161. Approximately 80% of the wholesale bakers in the United States are members of the ABA. Membership solicitation is informal and often new members are recommended by current members.

162. ABA dues are based on the amount of flour usage (in the case of a baker member) or on the amount of sales to the baking industry (in the case of allied members).

163. Questions relating to dues structures or policy questions of a legislative or regulatory nature are voted on by the Board of Governors.

164. The ABA has never used a list obtained in any manner from any other trade association in order to solicit members for ABA.

165. The various services of the ABA are available only to the ABA members.

166. The ABA has numerous committees which, as with most other trade associations, perform the basic work of the association. Membership in these committees is on a voluntary basis and is open to all ABA members. Committee decisions are on a consensus basis.

Findings of Fact

167. The ABA has an Environmental Health and Safety Committee which assists members in compliance with federal air and pollution control laws, and it works with the National Safety Council to promote industrial safety in the industry to comply with the OSHA laws and regulations.

168. The ABA has an Energy Task Force which is involved with compliance with the energy laws, and particularly with respect to the regulations concerning the use of natural gas, gasoline and diesel fuel. The Energy Task Force has been closely involved in sending out information to members relating to natural gas and the availability of gasoline and diesel fuel.

169. The Public Relations Committee is concerned with generic product promotion and prepares a public relations manual for the members in conducting their own public relations.

170. The ABA Food Technical Regulatory Affairs Committee is concerned with matters within the jurisdiction of the Food and Drug Administration and the Federal Trade Commission. For example, recently the FDA has sumstantially changed the labeling requirements for bakery products, and the ABA Food Technical Regulatory Affairs Committee prepared a manual to assist members in complying with the new labeling regulations.

171. The ABA has a very active Industrial Relations Committee which compiles statistics concerning collective bargaining agreements which are entered into by members of the industry so that members in other parts of the country will know what bargaining agreements other members have entered into.

172. The ABA also has a Transportation and Traffic Committee which is concerned with ICC-type regulations affecting the industry.

Findings of Fact

173. In addition to these committees, there is a Statistics Committee which keeps totals of production of bread and cake products by the industry so that people can follow the trends of production and compare them from month to month and year to year.

174. The Political Education Committee encourages individual member involvement in the political process. The Political Education Committee also compiled a list of all of the voting and campaign contribution requirements in the different states because there are some States that allow a contribution of corporate money to state and local campaigns.

175. The ABA also has a National Affairs Committee composed of thirty representatives of ABA members who volunteer for service on the Committee. This committee is the principal committee concerned with legislative activity.

176. BreadPAC has adopted a policy of discussing with the ABA's National Affairs Committee prospective contributions in order to get their advice and input.

177. The ABA's activities consist, inter alia, of lobbying activities, testifying before congressional committees and agencies, meeting with agencies of government and providing the ABA membership with current information about anticipated, proposed and enacted legislation affecting the membership. The ABA does not presently communicate about these matters with persons other than its members because, first, it does not believe that it would influence anybody but its members, and, second, because it has been advised by counsel that it would jeopardize the tax deductibility of the members' dues.

Findings of Fact

178. The ABA finances the publication of a weekly bulletin stating the ABA's views in order to inform the membership regarding anticipated proposed and enacted legislation affecting the membership. In addition, the Political Education Committee of the ABA will, from time to time, reprint material from the Congressional Record or analyses of bills prepared by the ABA staff, or material that has been prepared by others which is relevant to issues that the industry is concerned about. This material is circulated to approximately 1,500 people who have been designated by the ABA's membership to receive ABA services. The ABA also finances the preparation and distribution of other material to members urging them to contact their Senators and Congressmen to express their views on specific issues.

179. The ABA finances the preparation and presentation of the association's views to congressional committees on legislation and issues of interest to the association. In addition, the ABA finances the presentation of its views through direct communication with congressional staff people on a continuing basis. At all times since at least 1974, the ABA has had five or six individuals who are registered lobbyists and who are paid by the ABA. These registered lobbyists of the ABA contact senators, congressmen and their staffs to give them the ABA's views on matters of importance to the ABA.

180. The ABA finances the preparation and presentation of its views to administrative agencies on issues of importance to the ABA. The ABA's views are presented to the agencies through the filing of comments on rulemaking, testifying at administrative hearings and personal contacts with staff members of the administrative agencies.

Findings of Fact

181. There is an overlap of asociational membership between ABA and other trade associations, although the precise extent of such overlap is not known. However, a baker member might belong to one of a number of other organizations in the food industry; for example, the Grocery Manufacturers Association, the American Frozen Food Institute, the Food Marketing Institute, the Independent Bakers Association, plus state, regional and local bakers associations.

If a person were an allied member, supplier, or an equipment manufacturer, he might belong to the Bakery Equipment Manufacturers Association. If the person were a miller—that is a person who milled wheat into flour—he might belong to the Millers National Federation. If a person were in the business of supplying certain kinds of ingredients to the baking industry, he might belong to the National Bakery Supply Association. If he were a flour distributor, he might belong to the National Association of Flour Distributors. These are just some of the other organizations to which ABA baker and allied members might possibly belong.

182. Of these associations, three have PACs; namely, the Independent Bakers, the Frozen Food Institute and the Food Market Institute.

183. With respect to those matters which affect the baker member, *qua* baker, only the ABA represents the interests of all members of the baking industry.

184. The ABA contributes to and supports the activities of the American Institute of Baking, which is the technical and educational arm of the industry.

185. In 1974, the ABA began to take in allied (viz. supplier) members. Thus, the ABA's membership grew significantly during the 1974-1975 period.

Findings of Fact

186. The ABA Budget for fiscal year 1975 was $704,960; fiscal year 1976, $770,380; fiscal year 1977, $828,580; fiscal year 1978, $787,800. ABA estimates that in each year it spent approximately 20% of its budget in public affairs activities. The approximately 20% of the ABA budget does not include any BreadPAC activities.

187. Voluntary contributions are solicited and made by plaintiffs without regard to party affiliation of either the prospective contributor or the candidates, political parties or political campaign committees who are the potential recipients of these funds.

188. The solicitation activities of each of the Plaintiffs is directed to the dissemination of ideas, opinions and political information about matters of vital national and regional concern and of concern specifically to the respective industries which each of the Plaintiffs represents. (Plaintiffs Exhibits 1-01A, 1-02, 1-03, 1-04, 1-05, 1-06, 1-06A, 1-07, 1-08, 1-09, 1-10, 1-11, 1-12, 1-14, 1-15, 1-16, 1-17, 1-18, 1-19, 1-20, 1-21, 1-22, 1-23, 2-01, 3-01 through 3-13.)

189. The scope of the Plaintiffs' solicitation activities has been curtailed by the Federal Election Campaign Act, as amended, in that the number of persons which each Plaintiff may legally solicit has been curtailed by the Act. (Plaintiffs' Exhibits 1-13, 1-26, 1-27, 1-30, and ¶¶ 55, 56, 58, 60, 61, 62, 63, 64, 98, 101, 102, 103, 104, 106, 107, 108, 109, 111, 124, 128, 131, 133, 134, 135, 136, 139, 140, 142, 143 and 144, *supra.*)

190. Francis S. Andrews, President, American Fund Raising Services, is qualified to provide expert testimony on the impact of the Federal Election Campaign Act, as amended, upon the political fundraising activities of the Plaintiffs. (Andrews Deposition, pp. 4-11, 30-31.)

Findings of Fact

191. Mr. Andrews testified that, in his expert opinion, political fundraising is no different than any other type of fundraising, in that the methods for raising funds are the same. (Andrews Deposition, p. 11.)

192. Mr. Andrews further testified that the size and "quality" of the lists of potential contributors is the basic ingredient which will determine the relative success of any fundraising endeavor, including political fundraising. There is thus a direct correlation between the number of persons who may be solicited and who have some interest in the cause for which the funds are being solicited and the amount of money which can be raised. (Andrews deposition, pp. 38-41.)

193. Mr. Andrews identified "two major stumbling blocks" in the Federal Election Campaign Act, as amended, which impede the ability to obtain an adequate list of potential contributors. First, by requiring that each corporation grant prior permission to a trade association of which it is a member before any solicitation may take place, and by permitting each corporation to grant such permission to only one trade association per calendar year, the Act limits the size of the list of potential contributors who might otherwise have an interest in participating in the activities of the soliciting organization by making a political contribution. Second, by permitting the corporation to limit the number of persons within the company who may receive such solicitation materials, the Act further restricts the size of the list of potential contributors who might otherwise have an interest in participating in the activities of a soliciting organization by making a political contribution. (Andrews deposition, pp. 41-44.)

Findings of Fact

194. Upon review of Plaintiffs' Exhibits 1-02 through 1-23, 1-24, 1-26, 1-27, 1-29, 1-30, and 1-31, with respect to the political fundraising activities of Plaintiff BreadPAC, Mr. Andrews stated the following opinions:

(a) The methodology employed by BreadPAC in the solicitation of funds did not vary from 1974 to the present; and, therefore, did not affect the ability of BreadPAC to raise funds;

(b) The national economy did not affect the amount of funds raised by BreadPAC from 1974 to the present; and, in fact, BreadPAC raised more funds during the recession of 1974-1975, which was a "severely recessionary" time for fundraising generally, than during the period 1976 through 1979, which were "excellent years" for fundraising.

(c) The location of the fundraising events conducted by BreadPAC had no effect upon the amount of funds raised by BreadPAC.

(d) There is "no doubt" that the diminution of funds raised by BreadPAC was due to the prohibitions and restrictions imposed by the 1976 Amendments to the Federal Election Campaign Act, which, as previously explained, severely limited the size and scope of BreadPAC's solicitation activities.

(Andrews deposition, pp. 51-57.)

195. Prior to the time the 1976 Amendments to the Act became effective on May 11, 1976, each of the Plaintiffs had solicited voluntary contributions from various employees of its member corporations, without regard as to whether they were "executive or administrative personnel" within the meaning of 2 U.S.C. § 441b(b)(7) and also solicited voluntary contributions from individuals who were not employees of their respective corporate members. These solicitations were conducted without having ob-

tained prior approval from their respective corporate members.

196. In the instance of each Plaintiff, an integral part of their solicitation activities was, and in the case of Bread-PAC, the NRA, and RPAC, continues to be a discussion and espousal of the political and social ideas, opinions, views, and beliefs of each Plaintiff concerning matters of national concern and of concern to their respective industries.

197. The funds realized from this solicitation activity constitute the primary source of revenue for the Plaintiff political action committees. Moreover, the ability of, and the extent to which, the Plaintiff political action committees are able to express their support for candidates for Federal office by making political contributions to these candidates and otherwise engage in protected First Amendment activity is directly related to the extent to which they can solicit voluntary contributions.

198. The 1976 Amendments to the Act have had the effect upon each Plaintiff of substantially curtailing each Plaintiff's solicitation activities. In the case of Plaintiffs NLBMDA and LuDPAC, their solicitation activities have been terminated.

199. Furthermore, but for the Act, Plaintiffs would engage in a broad range of solicitations directed to those persons who have an affinity of interest with the Plaintiffs, without regard to whether such persons are employees or members of the organizational Plaintiffs.

200. The 1976 Amendments to the Act have limited the ability of each of the Plaintiffs to raise voluntary funds for political purposes, have limited each Plaintiff's ability to engage in protected political speech and association, and

have limited the right of persons with similar or related interests to receive from the Plaintiffs communications expressing political ideas, opinions, views, and beliefs and thereby associate themselves with the Plaintiffs.

201. The 1976 Amendments to the Act place no comparable prohibitions and limitations upon membership organizations and their political action committees, corporations and their political action committees, labor organizations and their political action committees, or independent political action committees.

202. The LuDPAC governing board was aware of the advisory opinion procedure, 2 U.S.C. § 437f, in 1976 but never discussed seeking an advisory opinion from the Commission prior to the institution of the instant action. *See* Deposition of Joseph William Hobson, April 17, 1979 at 70-74 (hereinafter "Hobson deposition").

203. The entire amount of dues of NLBMDA members are used solely to fund only the Legislation and Governmental Agency Affairs Division ("L&GAA") of NLBMDA and certain functions of the executive vice president. *See* Hobson deposition at 125.

204. The L&GAA of NLBMDA has responsibility for the dissemination of ideas, opinions and political information about matters that NLBMDA perceives to be of vital national or regional concern. *See* Hobson deposition at 90.

205. LuDPAC has no staff of its own; it operates out of NLBMDA's offices. *See* Hobson deposition at 58, 58A.

206. The ABA's Political Education Committee is not registered as a political committee pursuant to 2 U.S.C. § 433(a). *See* generally, public registration files located at the Federal Election Commission.

Findings of Fact

207. The ABA's Political Education Committee solicits contributions from ABA members—corporate and non-corporate—and uses such solicited contributions to pay the costs of BreadPAC's solicitations of voluntary contributions. *See* deposition of Robert J. Wager, April 16, 1979 at 57, 58 (hereinafter "Wager deposition").

208. BreadPAC has no staff employees itself; ABA employees carry out the day to day work of BreadPAC. *See* Wager deposition at 22.

209. The ABA treats every member as a corporation, whether they are or are not in fact corporations. *See* Wager deposition at 92.

210. Neither the ABA nor BreadPAC has ever solicited contributions from ABA's executive and administrative personnel. *See* Wager deposition at 83.

211. NRA has no way of telling the business organization form of any of its members. *See* Deposition of Brian G. Harron, April 10, 1979 at 36 (hereinafter "Harron deposition").

212. NRA seeks permission to solicit employees of all organizational members, allied members, and not-for-profit members. *See* Harron deposition at 58.

213. The most recent published figures compiled by the Commission which were released on May 10, 1979, covering the period January 1, 1977 - December 31, 1978, show:

(a) that two separate segregated funds established by trade associations were among the top ten non-party political committees in terms of both gross receipts (receipts minus transfers in from affiliated committees) and total contributions to candidates;

(b) that four of the top ten non-party political committees in terms of gross receipts (receipts minus transfers in from affiliated committees) were neither separate segregated funds established by corporations nor labor organizations but were independent political committees not connected to any organization;

(c) that of the top six non-party political committees in terms of gross receipts (receipts minus transfers in from affiliated committees) three were not connected to any organization, two were separate segregated funds of trade associations and one was the separate segregated fund of the American Medical Association, a trade association/membership organization. These six political committees' gross receipts for this period total $13,086,229.00; and

(d) that of the top three non-party political committees in terms of contributions to candidates, two were separate segregated funds of trade associations and one was the separate segregated fund of the American Medical Association, a trade association/membership organization. These three separate segregated funds contributed $3,742,848.00 during this period.

See FEC Report on Financial Activity 1977-1978, Interim Report No. 4, May, 1979 (copy of this four volume study is available upon request).

214. From his personal experience, Mr. Andrews found that employees of corporations which are solicited by their employer's trade associations give contributions in order to stay on the good side of the industry. See Deposition of Francis S. Andrews, August 15, 1979 at 139-40 (hereinafter "Andrews deposition").

Order

215. Mr. Andrews gave the trade association of which he was then president permission to solicit ten out of thirty executive and administrative personnel of his corporation. He did not give permission to the trade association to solicit the others because he would not "expose [his] junior executives to a corporate fundraising solicitation," thus, "exercising his judgment that they should not be placed under that moral pressure to give." *See* Andrews deposition at 138-39, 146.

....

Date United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

December 19, 1979

Cause No. 77 C 947

Bread Political Action Committee

v.

Federal Election Commission

ORDER

Enter Constitutional Questions certified to the U.S. Court of Appeals for the Seventh Circuit. Draft

Marshall, J.

Constitutional Questions

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION NO. 77 C 947

BREAD POLITICAL ACTION COMMITTEE, et al.,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,

Defendants.

CONSTITUTIONAL QUESTIONS
CERTIFIED TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

(Filed January 23, 1980)

1. Whether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, infringes plaintiffs' right of assembly guaranteed by the First Amendment to the Constitution of the United States of America?

2. Whether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States?

3. Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, to define the term "solicitation" infringes plaintiffs' right of as-

sembly guaranteed by the First Amendment to the Constitution of the United States, or deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States?

4. Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431, *et seq.*, to define the term "trade association," as used in 2 U.S.C. § 441b(b)(4)(D), violates the due process clause of the Fifth Amendment to the Constitution of the United States?

DATE: December 19, 1979

/s/ *Prentice Marshall*

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BREAD POLITICAL ACTION COMMITTEE, et al.,

Plaintiffs,

v. CIVIL ACTION NO. 77-C-947

THE FEDERAL ELECTION COMMISSION, et al.,

Defendants.

AFFIDAVIT OF DAVID A. KEENE

David A. Keene, being duly deposed and sworn, says:

1. That in April 1974 he was employed on the United States Senate staff of the Hon. James Buckley, former United States Senator from New York, in the capacity of Executive Assistant.

2. That during the course of his employment, he provided assistance to Senator Buckley during the deliberations concerning the 1974 Amendments to the Federal Election Campaign Act of 1971.

3. That he was specifically requested by Senator Buckley to draft an amendment to the aforementioned Act, which amendment expedited judicial review of any challenge to the constitutionality of the Act in question.

4. That he did draft the aforedescribed amendment, which, after review, modification and approval by Senator Buckley, was introduced by Senator Buckley and debated on the floor of the United States Senate, and accepted by that body as an amendment to the aforementioned Act on April 10, 1975.

5. That the amendment drafted by him, and as modified, approved and introduced by Senator Buckley reads as follows:

> On page 4 of the amendment, after line 20, insert the following:
>
> On page 65, between lines 6 and 7, insert the following:
>
> EXPEDITIOUS REVIEW OF CONSTITUTIONAL QUESTIONS
>
> Section 214. Title IV of the Federal Election Campaign Act of 1971 is amended by adding at the end thereof the following new section:
>
> JUDICIAL REVIEW
>
> "Sec. 407. (a) The Federal Election Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe any provision of this Act or of Chapter 29 of title 18, United States Code.

The district court shall immediately certify all questions of constitutionality of this Act of the United States court of appeals for that circuit, which shall hear the matter sitting en banc.

"(b) Notwithstanding any other provision of law or rule any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal must be brought within 20 days of the court of appeals decision.

"(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any question certified under subsection (a)."

6. That Senator Buckley's purpose and the intent of the amendment was to provide expedited judicial review of questions concerning the constitutionality of the Act to any aggrieved individual, organization or group of individuals or organizations which challenge the constitutionality of the Act in whole or in part, that the classes enumerated in the amendment were illustrative, and that such enumeration was not intended to limit the class or classes of aggrieved parties who might avail themselves of this amendment.

7. Further affiant saith not.

/s/ *David A. Keene*
David A. Keene

Subscribed and sworn to before me this 21st day of October, 1977.

/s/ *Joan F. McDarby*
Notary Public

My Commission expires: April 14, 1982

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BREAD POLITICAL ACTION COMMITTEE, et al.,

Plaintiffs,

v. Civil Action No. 77 C 947

THE FEDERAL ELECTION COMMISSION et al.,

Defendants.

Affidavit of James Buckley

James Buckley, being duly deposed and sworn, says:

1. That he was United States Senator from the State of New York from 1971 to 1977.

2. That, during the debate concerning the 1974 Amendments to the Federal Election Campaign Act of 1971, he caused to be drafted an amendment which provided for expedited judicial review of any challenge to the constitutionality of the Act in question.

3. That he directed that David A. Keene, who was at that time employed as Executive Assistant on his United States Senate staff, prepare a draft of the aforedescribed amendment.

4. That, after review, modification and approval of the same, he introduced the aforedescribed amendment on April 10, 1974, on which day the amendment was debated and accepted by the United States Senate.

5. That the amendment reads as follows:

On page 4 of the amendment, after line 20, insert the following:

On page 65, between lines 6 and 7, insert the following:

EXPEDITIOUS REVIEW OF CONSTITUTIONAL QUESTIONS

Section 214. Title IV of the Federal Election Campaign Act of 1971 is amended by adding at the end thereof the following new section:

JUDICIAL REVIEW

"Sec. 407. (a) The Federal Election Commission, the national committee of any national party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe any provision of this Act or of Chapter 29 of title 18, United States Code. The district court shall immediately certify all questions of constitutionality of this Act to the United States court of appeals for that circuit, which shall hear the matter sitting en banc.

"(b) Notwithstanding any other provision of law or rule any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal must be brought within 20 days of the court of appeals decision.

"(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any question certified under subsection (a)."

6. That the purpose and intent of the amendment was to provide expedited judicial review of questions concerning the constitutionality of the Act, and that it was not his intent to exclude from the provisions of this amendment any individuals or group of individuals acting through associations or organizations in challenging the constitutionality of the Act in whole or in part.

7. Further affiant saith not.

/s/ James Buckley
James Buckley

Subscribed and sworn to before me this 11 day of November, 1977.

/s/ Charles W. Minerly, 3rd
Charles W. Minerly, 3rd
Notary Public, State of New York
No. 41-7964440 - Queens County
Certificate filed in New York County
Term Expires March 30, 1978

CERTIFICATE OF SERVICE

I certify that I caused a copy of the attached Plaintiffs' Petition For Permission To Appeal Pursuant To Rule 5 Of The Federal Rules Of Appellate Procedure to be mailed to Defendants' Counsel, William Oldaker, Federal Election Commission, 1325 K Street, N.W., Washington, D.C. 20463 on November 18, 1977.

/s/ Jeffrey Cole

Office-Supreme Court, U.S.
FILED
APR 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1481

In the Supreme Court of the United States

OCTOBER TERM 1980

BREAD POLITICAL ACTION COMMITTEE, ET AL.,
APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, EN BANC

MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS THE APPEAL OR IN THE ALTERNATIVE TO AFFIRM

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APRIL 1981

QUESTIONS PRESENTED

(1) Whether a right of appeal to this Court is unavailable to appellants who are not "the Commission, the national committee of any political party or any individual eligible to vote" as required to invoke 2 U.S.C. § 437h.

(2) Whether, if an appeal does lie, this Court should summarily affirm the *en banc* decision of the court of appeals that 2 U.S.C. § 441b(b)(4)(D) is consistent with the first and fifth amendments of the Constitution of the United States.*

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* The other parties to this proceeding include: National Lumber and Building Material Dealers Association ("NLBMDA"), Lumber Dealers Political Action Committee ("LuDPAC"), National Restaurant Association ("NRA") and Restaurateurs Political Action Committee ("RPAC") as plaintiffs/appellants. Named as other defendants are: Francis R. Valeo, Secretary of the United States Senate and Ex-Officio member of the Federal Election Commission, Edward Henshaw, Clerk of the U.S. House of Representatives and Ex-Officio member of the Commission and Vernon W. Thomson, Thomas E. Harris, Neil Staebler, William Springer, Robert O. Tiernan and Joan D. Aikens, as members of the Commission, and Hon. Griffin Bell, as Attorney General. By order of June 10, 1977, the Attorney General was dismissed as a defendant. Messrs. Staebler and Springer are no longer Commission members; Messrs. John W. McGarry and Frank P. Reiche are currently members of the Commission. William F. Hildenbrand is currently the Secretary of the Senate and Ex-Officio member of the Commission, rather than Francis R. Valeo.

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In the Supreme Court of the United States

OCTOBER TERM 1980

No. 80-1481

BREAD POLITICAL ACTION COMMITTEE, ET AL., APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, EN BANC

MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS THE APPEAL OR IN THE ALTERNATIVE TO AFFIRM

Appellee Federal Election Commission ("the Commission" or "FEC") moves to dismiss this appeal because none of the appellants are among the categories of eligible plaintiffs authorized by Congress to invoke the appellate jurisdiction of this Court, or the jurisdiction of any federal court, under 2 U.S.C. § 437h.[1] In the alternative, if an appeal does lie

[1] This provision is § 310 of the Federal Election Campaign Act of 1971 (the "Act" or "FECA"), Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974), by the Federal Election Campaign Act Amendments

pursuant to 2 U.S.C. § 437h, the Court should affirm the decision below because the questions presented were correctly decided.

OPINIONS BELOW

The January 12, 1979, opinion of a panel of the United States Court of Appeals for the Seventh Circuit, overruling the district court's decision not to certify under § 437h and remanding the case for fact-finding and certification, is published at 591 F.2d 29 (7th Cir. 1979). The December 19, 1979, order of the United States District Court for the Northern District of Illinois certifying constitutional questions to the court of appeals is not published. The December 5, 1980, decision of the United States Court of Appeals for the Seventh Circuit is reported at 635 F.2d 621 (7th Cir. 1980) (en banc) and appears at Appendix A of appellants' Jurisdictional Statement ("J.S. App. at ——").

JURISDICTION

Appellants rely upon 2 U.S.C. § 437h as the basis for this Court's jurisdiction to hear and decide this case.

STATUTES INVOLVED

This case concerns several provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C.

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of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976), by the Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655 (1977), and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). The relevant provisions of the Act are codified in Title 2, United States Code.

§ 431 *et seq.* Specifically, 2 U.S.C. § 437h is at issue with regard to the jurisdiction of this Court, and appellants challenge 2 U.S.C. § 441b(b)(4)(D) on constitutional grounds. For the Court's convenience, 2 U.S.C. §§ 437h, 441b are set forth in the Appendix to this motion.

STATEMENT OF THE CASE

This case began when plaintiffs filed a complaint on April 4, 1977, in the United States District Court for the Northern District of Illinois seeking an injunction against the enforcement of 2 U.S.C. § 441b(b)(4)(D) or, alternatively, the certification of the constitutionality of that provision to the court of appeals under 2 U.S.C. § 437h.[2] The district court declined to issue an injunction because plaintiffs had not demonstrated a probability of success on the merits and denied the motion for certification because plaintiffs are not among those eligible to invoke the extraordinary procedures of 2 U.S.C. § 437h. Plaintiffs' request for interlocutory appeal on the question of the proper construction of § 437h was granted by the court of appeals under 28 U.S.C. § 1292(b) on December 19, 1977.

After concluding that § 437h is available to any and all potential plaintiffs, the court of appeals remanded the case to the district court to: "(1) identify the constitutional and fact issues raised by the complaint; (2) take whatever evidence the court finds necessary to a decision of those issues; (3) make findings of fact; and (4) certify the assembled record

---

[2] 2 U.S.C. § 441b(b)(4)(D) was enacted as section 321 (b)(4)(D) of the Federal Election Campaign Act Amendments of 1976, *supra*.

and the constitutional questions arising therefrom to this court for decision pursuant to § 437h." 591 F.2d at 36.

Denying the Commission's opposition to certification, the district court certified four constitutional questions[3] to the *en banc* court of appeals on December 19, 1979. On December 5, 1980, the court of appeals *en banc* answered the questions so as to uphold the challenged provision. With regard to § 437h, the court declined to overrule the earlier decision of the panel concerning the eligibility of appellants to invoke § 437h, J.S. App. at 6; concluded that because the parties disagreed as to the meaning and constitutionality of § 441b(b)(4)(D), any argument concerning a lack of an Article III case or controversy was frivolous and had been decided in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), J.S. App. at 7; and, held that because the word "appropriate" modifies "actions" and not "questions of constitutionality", review under § 437h is not limited to facial challenges. J.S. App. at 8.

ARGUMENT

I. APPELLANTS HAVE NO RIGHT OF APPEAL TO THIS COURT UNDER § 437h BECAUSE CORPORATIONS AND THEIR SEPARATE SEGREGATED FUNDS ARE NOT AMONG THOSE ENUMERATED BY CONGRESS AS ELIGIBLE TO INVOKE § 437h.

This Court's appellate review of the seventh circuit's decision is sought pursuant to 2 U.S.C. § 437h. The Commission submits, however, that appellants may not utilize § 437h to require this Court to review the decision below.

---

[3] Appellants appeal to this Court the decision of the court of appeals with regard to only three of the certified questions.

Section 437h is a precise provision which establishes a special but limited procedure for pre-enforcement judicial consideration of certain constitutional challenges to the Act. Specifically, § 437h is limited by its terms to appropriate actions filed by the "Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President." Plaintiffs herein, two incorporated trade associations and three separate segregated funds, are not among those enumerated by Congress as eligible plaintiffs. Therefore, they may not utilize § 437h as a jurisdictional base to require appellate review by this Court.

The legislative history of FECA's judicial review provisions supports the construction of § 437h as applicable only to those plaintiffs enumerated by Congress. Where Congress sought broad access to federal courts for review under FECA, it employed the traditionally broad language often used in jurisdictional provisions.[4] Thus, all persons subject to Commission enforcement actions have the opportunity for *de novo* review in federal district court, 2 U.S.C. § 437g(a)(6), and "[a]ny party aggrieved" by the Commission's dismissal of a complaint or by a failure of the Commission to act timely has a right of action against the Commission in federal court. 2 U.S.C. § 437g(a)(8).

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[4] *See, e.g.*, 15 U.S.C. § 77i(a) (1970); 16 U.S.C. § 8251(b) (1970); 47 U.S.C. § 402(b) (1970); 49 U.S.C. § 1486(a) (1970); and 33 U.S.C. § 921(b) (1964) for examples of statutory provisions authorizing suit by persons or parties "aggrieved," "any party in interest" or a party with a "substantial interest."

In § 437h, however, Congress specifically enumerated the plaintiffs eligible to utilize the extraordinary procedures of this provision and to invoke pre-enforcement review of the constitutionality of FECA.[8] Thus, Congress limited jurisdiction under § 437h to actions by the "Commission, the national committee of any political party, and individuals eligible to vote. . . ." To read § 437h more broadly is to extend the extraordinary procedures to "parties aggrieved" or "any interested person", precisely what Congress did not do.

While the court declined to overrule the earlier panel decision as to statutory standing, several other courts have concluded that the statutory grant must be narrowly read. Thus, the district court in *Buckley* v. *Valeo*, 387 F. Supp. 135 (D.D.C. 1975) read § 437h as granting standing only to the specified parties. 387 F. Supp. at 142 n.14. More recently, the United States District Court for the District of Columbia recognized that:

> [A]ccess to court pursuant to § 437h(a) was by its terms limited to "the Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President. . . ."

Martin Tractor v. *Federal Election Commission*, 460 F. Supp. 1017, 1019 (D.D.C. 1978), *aff'd* 627

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[8] Specification of particular plaintiffs eligible to invoke the jurisdiction of a federal court is not uncommon. *See e.g.*, 15 U.S.C. § 78y(a) (1976) and 39 U.S.C. § 3628 (1976) (party to the proceedings); 15 U.S.C. § 45(c) (1976) (person required to cease and desist). *See also Consumer Federation of America* v. *Federal Trade Commission*, 515 F.2d 367 (D.C. Cir. 1975); *Wallach* v. *Securities and Exchange Commission*, 206 F.2d 486 (D.C. Cir. 1953).

F.2d 375 (D.C. Cir. 1980), *cert. denied sub nom. National Chamber Alliance for Politics* v. *Federal Election Commission*, —— U.S. ——, 100 S.Ct. 360 (1980). The court also limited actions ". . . appropriate for vindication in a special declaratory judgment action under § 437h . . . to those filed by eligible voters who put . . . at issue . . . their rights as voters . . particularly where, under the statutory scheme there is an alternative process for resolution of the substantive issue. . . ." *Id.*[6] And, on a motion to intervene, the United States District Court for the Eastern District of New York concluded:

> To construe [section 437h] as granting movants an unconditional right to intervene would require this court to permit every eligible voter in the United States the same right. Congress could hardly have contemplated such a result in a statute designed for expedited judicial review.

Republican National Committee v. *Federal Election Commission*, 461 F. Supp. 570 (S.D.N.Y. 1978).

In sum, Congress has limited the availability of the extraordinary pre-enforcement procedures of § 437h to explicit, specified parties. Lower federal courts have recognized the narrowness of the provision. None of the appellants herein are among those enumerated. Congress's limitation on such an extraordinary procedure must be respected, not extended to encompass all parties affected by the Act. Because appellants are not eligible plaintiffs under § 437h,

---

[6] The court of appeals in *Martin Tractor* found it unnecessary to reach the scope or applicability of the standing issue, but noted the conflict between the district court ruling and the decision of the panel in the instant case. 627 F.2d 378 n.6, 392.

they may not invoke the appellate jurisdiction of this Court pursuant to that provision. Thus, the appeal should be dismissed for lack of jurisdiction.[7]

II. IN THE ALTERNATIVE, IF AN APPEAL LIES UNDER § 437h, THE COURT SHOULD SUMMARILY AFFIRM THE DECISION BELOW BECAUSE THE QUESTIONS CERTIFIED WERE PROPERLY DECIDED BY THE *EN BANC* COURT.

Appellants ask this Court to overturn the decision rendered by the *en banc* court of appeals which upheld an exception to the long-standing prohibition on corporate and labor organization contributions and expenditures in connection with federal elections, 2 U.S.C. § 441b.[8] Appellants do not challenge the general prohibition—2 U.S.C. § 441b(a)—which makes unlawful the activity in which they wish to engage.[9]

---

[7] The Commission does not ask this Court to view appellants' jurisdictional statement as a petition for certiorari, denying same, since jurisdiction was improper in the district court and the appellate court lacked jurisdiction on certification.

[8] The first congressional effort in this area was directed only at corporations. The Act of January 26, 1907 (the Tillman Act), 34 Stat. 864 (1907), prohibited corporations from making "a money contribution in connection with" any federal election. The evolution of 2 U.S.C. § 441b is set forth, through the 1971 legislation, in *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972); *United States* v. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)*, 352 U.S. 567 (1957); *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106 (1948).

[9] Numerous federal courts have held the prohibition constitutional in the context of specific cases. *California Medical Association* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9127 (9th Cir. May 23, 1980) *possible jurisdiction postponed* No. 79-1952 (Oct. 6, 1978); *Federal*

Rather, appellants contend that the exception, 2 U.S.C. § 441b(b)(4)(D), unconstitutionally infringes upon first and fifth amendment rights.

The seventh circuit's *en banc* decision correctly recognized the challenged section as an exception to an unchallenged prohibition. The court correctly concluded that the exception did not unconstitutionally infringe upon appellants' first amendment interests nor was it unconstitutional under the fifth amendment. The court, in reaching its decision, properly applied the traditional analysis set out by this Court in first and fifth amendment challenges. Thus, if this Court concludes that a right of appeal exists, it should summarily affirm the decision below.

A. The court of appeals correctly held that 2 U.S.C. § 441b(b)(4)(D) does not impermissibly infringe appellants' right of assembly.[10]

The court below correctly concluded that 2 U.S.C. § 441b(b)(4)(D), in excluding certain contributions

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Election Commission v. *Lance*, 635 F.2d 1132 (5th Cir. 1981) (en banc); *United States* v. *Chestnut*, 533 F.2d 40, 51 n.12 (2d Cir. 1976), *cert. denied*, 429 U.S. 829 (1976); *United States* v. *Boyle*, 482 F.2d 755 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1076 (1973); *United States* v. *Pipefitters Local Union No. 562*, 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, *rev'd on other grounds*, 407 U.S. 385 (1972); *Federal Election Commission* v. *National Right to Work Committee*, 501 F. Supp. 422 (D.D.C. 1980), *appeal docketed*, Nos. 80-1487, 80-1488 (D.C. Cir. May 7, 1980); *Federal Election Commission* v. *Weinsten*, 462 F. Supp. 243 (S.D.N.Y. 1978); *United States* v. *Clifford*, 409 F. Supp. 1070, 1072 (E.D.N.Y. 1976); *United States* v. *Brewers' Association*, 239 F. 163 (W.D. Pa. 1916).

[10] The district court rejected the question submitted by plaintiff and certified instead:

> Whether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, infringes plaintiffs' right of assembly guaranteed

and expenditures from the prohibition of § 441b(a), does not impermissibly infringe upon rights protected by the first amendment. Indeed, applying appropriate first amendment analysis, the court concluded that the restrictions imposed by § 441b serve an overriding governmental interest:

> The transcendent legislative objective served by the Federal Election Campaign Act is the elimination of corruption and the appearance of corruption in the federal election process. *Id.* The restrictions imposed by Section 441b of the Act on labor organizations and corporations, including incorporated trade associations, are designed to serve both this objective and the additional objective of protecting individuals from economic coercion. *United States* v. *United Automobile Workers*, 352 U.S. 567, 570-584; *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 113.

J.S. App. at 10. *See also Democratic Party of the United States of America* v. *LaFollette*, —— U.S. ——, 49 U.S.L.W. 4178, 4182 (February 25, 1981). And, the court concluded that the challenged provision "is a very narrowly drawn aspect of a statutory scheme carefully designed to balance a compelling governmental interest and jealously guarded First Amendment freedoms." J.S. App. at 15. Indeed, the court found that:

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by the First Amendment to the Constitution of the United States of America.

The court of appeals concluded that it "should address the prior restraint issue since plaintiffs raised it below and Judge Marshall at least referred to the First Amendment in his first question to us." J.S. App. at 9 n.7.

> [n]othing in § 441b(b)(4)(D) limits the expression or dissemination of political ideas and information either to individuals described in the Section or to any other individual. Indeed there has been no showing that this provision has had or could have any prior restraining effect whatsoever on the free flow of political information and opinion by trade associations or their political committees. . . . Nor does § 441b(b)(4)(D) prohibit . . . trade associations from joining the shareholders and executive or administrative employees of its member corporations to it in common cause. They are free to solicit any individual . . . to join their trade associations.

J.S. App. at 12-13.

Thus, the court of appeals properly recognized that the compelling governmental interests served by the statutory prohibition override any alleged infringement on first amendment freedoms. The court correctly concluded that § 441b(b)(4)(D) does not impermissibly infringe appellants' right of assembly.

B. 2 U.S.C. § 441b(b)(4)(D) does not violate the due process clause of the fifth amendment.[11]

The court of appeals also properly upheld § 441b(b)(4)(D) against an equal protection challenge under the fifth amendment's due process clause. J.S. App. at 16-20. First, the court found that appellants' argument was "largely premised . . . on a misreading of the statute." J.S. App. at 17. That

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[11] The second question certified to the court of appeals was:

> Whether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

is, appellants claimed that § 441b(b)(4)(D) prohibited them from soliciting anyone other than the shareholders or executive and administrative employees of their member corporations, individuals identified in the challenged provision. This premise, the court concluded, is unsupported by the statute and the regulations and "is simply not correct." J.S. App. at 17. Rather, appellants may, consistent with FECA, solicit contributions from their stockholders, employees, and members pursuant to § 441b(b)(4)(A), (B), and (C)[12] as well as from employees of their corporate members under § 441b(b)(4)(D). Thus, the court noted that:

> to the extent that trade associations are treated differently from other corporations and other membership organizations, the difference lies in the fact that trade associations are not limited as are the others to soliciting their own shareholders, employees or members.

J.S. App. at 18 (footnote omitted).

Although appellants were not able to establish that they are treated differently by the statute in any but a beneficial way, the court also concluded that any dissimilar treatment "follows from the rather obvious facts that each of the different groups has a different structure and a different kind of constituency and that each requires somewhat different regulation to curb abuses the Act was intended to halt." J.A. App. at 18. Finally, when comparing labor organizations

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[12] The Commission submitted below that because plaintiffs had never utilized any of the solicitation opportunities available pursuant to § 441b(b)(4)(A), (B), or (C) they were unable to establish an Article III injury flowing from § 441b(b)(4)(D).

and trade associations, the court found that "the relationship that obtains between a trade association and the employees of its member corporations differs significantly from that existing between union members and their unions." J.S. App. at 19. As this Court itself has recognized, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike. . . ." *Buckley* v. *Valeo*, 424 U.S. at 97-98.

Thus, the court determined that appellants' argument "runs afoul" by their "failure to demonstrate" that they are "similarly situated." J.S. App. at 20. The court correctly answered in the negative the second question certified by the district court. This Court should summarily affirm the decision of the court of appeals.

C. Section 441b(b)(4)(D) is not overbroad.[13]

The court of appeals also correctly answered the district court's third question in the negative. The court noted that appellants did not claim that the phrase "soliciting contributions" was vague. J.S. App. at 21. Rather, appellants claimed that the phrase was so overly broad as to permit the Commission to issue inconsistent advisory opinions. The court below concluded that the advisory opinions proffered by appellants were well within the parameters

[13] The third question certified by the district court stated:

> Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431, *et seq.*, to define the term "solicitation" infringes plaintiffs' right of assembly guaranteed by the First Amendment to the Constitution of the United States or deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

of reasonableness and not inconsistent. J.S. App. at 22. The court unanimously held that Congress's use of the phrase "solicit contributions" did not render the statute overbroad or unconstitutionally vague.

CONCLUSION

The Commission submits that this case should be dismissed on the ground that appellants may not invoke the appellate jurisdiction of this Court under 2 U.S.C. § 437h. In the alternative, the Court should summarily affirm the decision below because the *en banc* court of appeals correctly decided the substantive issues raised, applying principles established by this Court.

Respectfully Submitted,

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APRIL 1981

APPENDIX

2 U.S.C. § 437h

(a) *Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc.* The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) *Appeal to Supreme Court; time for appeal.* Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) *Advancement on appellate docket and expedited disposition of certified questions.* It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

2 U.S.C. § 441b

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members

of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the cor-

poration for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

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No. 80-1481

In the Supreme Court of the United States

OCTOBER TERM, 1980

BREAD POLITICAL ACTION COMMITTEE, ET AL.,
Appellants,

vs.

THE FEDERAL ELECTION COMMISSION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, EN BANC

APPELLANTS' REPLY TO MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS THE APPEAL OR IN THE ALTERNATIVE TO AFFIRM

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ARGUMENT

I.

THIS COURT HAS JURISDICTION PURSUANT TO 2 U.S.C. § 437h

Despite the fact that the Seventh Circuit has twice upheld the plaintiffs' standing under 2 U.S.C. §437h,[1] the FEC has argued that this Court lacks subject matter jurisdiction because the plaintiffs are not among the parties explicitly enumerated in 2 U.S.C. §437h. *See* "Motion Of The Federal Election Commission To Dismiss The Appeal Or In The Alternative To Affirm" at 4. That section provides in pertinent part that:

> "(a) The Commission, the national committee or any political party, or any individual eligible to vote in any election for the Office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc."

Relying on a hyper-literal parsing of §437h, the FEC contends that the availability of §437h is a function not of the nature of the challenge to the Act, but rather solely of the identity of the particular plaintiff. Under this view, only the Commission, the national committee of any political party, or any individual eligible to vote in any election

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[1] *See* Bread Political Action Committee v. Federal Election Commission, 591 F.2d 29 (7th Cir. 1979); Bread Political Action Committee v. Federal Election Commission, ___ F.2d ___ (7th Cir. 1980) (En Banc) (Appendix to Jurisdictional Statement at 8). For the convenience of the Court, we have reproduced the first *BreadPAC* opinion (591 F.2d 29) as an Appendix, *infra*.

for the Office of President may invoke §437h in order to challenge the constitutionality of the Act. Since the instant plaintiffs do not fall within the explicit language of §437h, the FEC concludes that they lack standing to invoke §437h's provisions, and that this Court is without subject matter jurisdiction. For the reasons so carefully explicated in *Bread Political Action Committee* v. *Federal Election Commission*, 591 F.2d 29 (7th Cir. 1979) which reasons were affirmed unanimously in *Bread Political Action Committee* v. *Federal Election Commission*, ... F.2d ..... (7th Cir. 1980) (En Banc), this contention must be rejected.

It is fundamental that the gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Supreme Court so largely depends for illumination of difficult constitutional questions. *See Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

It is difficult to imagine anyone more personally affected by, or interested in, the provisions of the Act dealing with trade associations and their political action committees than trade associations themselves. Yet, acceptance of the FEC's construction of § 437h would permit parties having no real and substantial interest in matters affecting trade associations to seek judicial review of the Act's trade association provisions but would deny that right to those most directly and substantially affected by the Act. Since in enacting § 437h Congress sought to insure prompt evaluation of the constitutionality of basic structures of the Act,[2] it would not have denied standing to the class

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[2] *Buckley* v. *Valeo*, 387 F. Supp. 135, 138, 141 (D.D.C. 1975); *Buckley* v. *Valeo*, 519 F.2d 817, 819 (D.C. Cir. 1975) (". . . The intention of Congress [in enacting § 437h was] for expedition in appellate disposition."). *BreadPAC* v. *FEC*, App. *infra*, at 4-5; 8-9; 11-12, n.9.

most intimately affected. For prompt evaluation of those basic provisions of the Act dealing with trade associations would surely not result if *only* the Commission, the national committee of a political party or some independent voter had standing to seek expedited judicial review in the Courts of Appeals. *See Bread PAC* v. *FEC*, App. *infra*, at 4-5; 9-11.

It is fatuous to suggest either that some anonymous individual voter or the national committee of a political party would contest the Act's trade association provisions, and it is idle to contend that the Commission could lawfully, *see* App. *infra* at 10, n.6, or would ever raise a constitutional challenge to the Act upon which it depends for its very sustenance. In short, acceptance of the FEC's construction of § 437h would subvert rather than achieve the goals subserved by that section.[3] *See* App. *infra* at 8-11.

Lingering doubts about the Congressional intent underlying § 437h are silenced by an examination of *Buckley* v.

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[3] There exists the very substantial question whether the latter two classes of plaintiffs enumerated in 437h could in fact maintain an action contesting the Act's trade association provisions. While Congress has the power to accord standing to parties who might otherwise be barred by the Court's "prudential" rules relating to standing, it cannot, by virtue of the case or controversy requirement of Article III, accord standing to a potential litigant who cannot allege and prove a distinct and palpable injury to himself. *See, Warth* v. *Seldin*, 422 U.S. 490, 498-501 (1975). Since it is unlikely that, with the possible exception of the Commission, any of the parties enumerated in § 437h could demonstrate such an injury resulting from the Act's trade association provisions, acceptance of the FEC's construction of 437h could theoretically result in a situation in which no one would have standing to initiate judicial review of the Act's trade association provisions under the Declaratory Judgment Act. *See BreadPAC* v. *FEC*, App. *infra* at 10-11.

Valeo, 424 U.S. 1 (1976). *Buckley* involved a challenge to the Federal Election Campaign Act made by "a candidate for the Presidency of the United States, a United States Senator who [was] a candidate for re-election, a potential contributor, the Committee for a Constitutional Presidency —McCarthy '76, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, Inc., the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc." *Id.* at 7-8. In addition, leave to intervene was granted to the "Center for Public Financing of Elections, Common Cause, the League of Women Voters of the United States, Chellis O'Neal Gregory, Norman F. Jacknis, Louis D. Widers, Daniel R. Noyes, Mrs. Edgar B. Stern, Charles F. Taft, John W. Gardner, and Ruth Clusen." *Id.* at 9, n. 5.

Despite the fact that the overwhelming majority of the plaintiffs and intervenors were *not* within the parties enumerated in § 437h, this Court held that "at least some of the appellants [had] a 'sufficient personal stake' in a determination of the constitutional validity of the Act. . . ." *Id.* at 12. *Immediately* after this statement appeared the following footnote:

> "This Court has held, for instance, that an organization 'may assert, on behalf of its members, a right personal to them to be protected from compelled disclosure . . . of their affiliation.' NAACP v. Alabama, . . . Bates v. Little Rock, ..." *Id.* at 12, n. 10.

This reference to the organizational rather than to the individual plaintiffs takes on heightened significance when one recalls that the *district court's* invocation of § 437h seemed to have been predicated solely on the fact that among the plaintiffs were individuals who were eligible

voters and thus fell within the literal language of § 437h.[4] This Court, however, manifestly ignored the fact that there were voter-plaintiffs and focused instead, in note 10, on the institutional plaintiffs who, under the government's view here, would not have standing to seek review pursuant to § 437h.

Given the district court's inordinate preoccupation with the status of the individual plaintiffs, unless we are to ascribe to this Court an exceedingly high degree of caprice the focus on the organizational, rather than the individual, plaintiffs in note 10 of the *Buckley* decision must be construed to mean that the availability of § 437h(a) is not limited merely to the three classes of plaintiffs enumerated in that Section. *See* App. *infra* at 11-14; 16.

Other portions of the *Buckley* decision also conclusively demonstrate that the FEC's reading of § 437h is incorrect. It is obvious that restricting the availability of judicial review under §437h only to the Commission, the national committee of a political party, or a voter would *not* provide judicial review to the extent permitted by Article III. Yet, the Court in *Buckley* unequivocally stated that "[*i*]*t is clear that Congress in enacting 2 U.S.C. § 437h . . . intended to provide judicial review to the extent permitted by Article III.*" 424 U.S. at 11-12. (Emphasis supplied). *See* App. *infra* at 14; 16.

Finally, the Seventh Circuit's meticulous opinion in the first *BreadPAC* case demonstrates that Congress did not intend to prohibit judicial review under §437h merely because constitutional challenges to the Act could be raised

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[4] *See, Buckley* v. *Valeo,* 387 F. Supp. 135, 142 n. 14 (D.D.C. 1975).

defensively by defendants in enforcement proceedings brought by the Commission pursuant to 2 U.S.C. §437g. Indeed, as the Seventh Circuit conclusively proved, it is illogical to make the availability of §437h dependent upon such an adventitious circumstance as the identity of the plaintiff or whether the constitutional challenge is to be raised offensively or defensively. For it is manifest that the importance of and need for prompt appellate resolution of constitutional challenges to the Act—the desideratum of §437h—is necessarily a function not of the identity of a particular plaintiff, but solely of the nature of the challenge to the Act. *See* App., *infra* at 5-10.

In sum, properly construed, §437h is not, as the FEC has twice unsuccessfully argued, a statutorily imposed *restriction* on the availability of expedited judicial review in the Courts of Appeals and this Court, but rather represents Congress's desire to *expand* traditional notions of standing so as to allow certain potential plaintiffs who, but for §437h, might not have standing, to institute actions in the district court. *See* App. *infra*, at 9-11.

II.

THE QUESTIONS ARE SUBSTANTIAL

As noted in our Jurisdictional Statement, despite the deep division in the court of appeals regarding the constitutionality of §441b(b)(4)(D), the entire court unhesitatingly agreed that "the questions presented . . . are '*substantial*', ..." *See* Jurisdictional Statement at 7. In our Statement, we also adverted to the FEC's unqualified concession that the case presented "serious constitutional issues" which "go to the heart of the [Federal Election Campaign] Act" and which have "potential and far reaching impact on the . . . Act . . . ." *Id.* Finally, we explored the irreconcilable conflict between the Department of Jus-

tice and the FEC regarding the permissible reach of the Act. *Id.* at 8-9.

In its brief, the FEC has neither disavowed the findings of the court of appeals nor its prior admissions in the district court. It has neither disclaimed nor sought to minimize the existence or the extent of the conflict between its construction of the Act and that of the Department of Justice. Nor has it made any attempt to answer or refute a single argument raised by the dissenting judges in the Seventh Circuit or in our Jurisdictional Statement. Finally, and perhaps most importantly, the FEC has ignored the detailed findings of the district court that the Act has materially, substantially and adversely affected the First Amendment rights of not only the plaintiffs but of vast numbers of American citizens. *See* Jurisdictional Statement at 2-3; 10-11; 13-14; 17.

The mode of presentation employed by the FEC is not, of course, new. What is disturbing is that it should be employed by the government in this Court in a case implicating core First Amendment values. By its superficial presentation, the FEC has not only abdicated its responsibilities to this Court, but has virtually conceded the substantiality of the questions raised by this appeal.

In place of principled analysis, the FEC has merely paraphrased the conclusions of the majority of the court of appeals without making the slightest attempt to analyze those conclusions or the basis upon which they purportedly rest. It belabors the obvious to posit that the substantiality, *vel non*, of a question brought to this Court for review cannot be determined merely by reiterating the ultimate conclusions of a majority of a divided court of appeals without regard to the validity and intrinsic merit of those conclusions. *See* R. Stern and E. Gressman, Supreme Court Practice 319-27 (5th ed. 1978).

The FEC's barren, unprincipled claim that the questions in this case are insubstantial not only ignores the intimations of *Buckley* v. *Valeo* and a half century of doctrinal development of the First Amendment, but puts out of view the palpable and devitalizing impact which §(D) has had on the political process and on the First Amendment rights of literally millions of our citizens. Indeed, with the possible exception of *Buckley* itself, perhaps never before in its history has this Court considered a statute which in its operative effect has affected the First Amendment rights of so many as has §(D). Thus, plenary review is not simply appropriate—it is, we respectfully submit, mandatory.[5]

CONCLUSION

Probable jurisdiction should be noted and the case set down for briefing and argument.

Respectfully submitted,

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National Chamber Litigation
Center, Inc.

[5] Despite the FEC's intimations to the contrary, the questions involved in this case are essentially ones of first impression, having been considered only by the court below which was sharply divided in its ultimate holding.

APPENDIX

APPENDIX

BREAD POLITICAL ACTION COMMITTEE et al.,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION et al.,
Defendants-Appellees.

No. 78-1150.

United States Court of Appeals, Seventh Circuit.

Argued Nov. 8, 1978.

Decided Jan. 12, 1979.

Jeffrey N. Cole, Chicago, Ill., for plaintiffs-appellants.

Charles N. Steele, Federal Election Commission, Washington, D. C., for defendants-appellees.

Before FAIRCHILD, Chief Judge, and SWYGERT and TONE, Circuit Judges.

SWYGERT, Circuit Judge.

This interlocutory appeal requires us to construe the extraordinary provision for expedited judicial review of the Federal Election Campaign Act, as amended, 2 U.S.C. §§ 431 *et seq.* Plaintiffs-appellants are a number of trade associations and their political action committees. The defendants are the Federal Election Commission, the Secretary of the Senate, the Clerk of the House, the members of the Commission, and the Attorney General. The plaintiffs seek to challenge the constitutionality of various provisions of the Act which they say restrict their financial activities in the political arena. The issue on this appeal

is whether these plaintiffs may invoke the expedited review provision, § 437h,[1] and have their constitutional challenges certified for initial review by this court sitting en banc.

After filing their complaint in the district court, plaintiffs moved, under § 437h, for immediate certification to this court of the constitutional questions presented. The district court held a hearing and rendered an oral decision denying the motion to certify. The court construed § 437h

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[1] 2 U.S.C. § 437h provides:

§ 437h. Judicial review.—Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc.

(a) The Commission, the national committee or any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

Appeal to Supreme Court; time for appeal

(b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

Advancement on appellate docket and expedited disposition of certified questions

(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

to restrict the availability of expedited review to the three types of plaintiffs listed in the first sentence of § 437h(a): "[t]he [Federal Election] Commission, the national committee of any political party, or any individual eligible to vote [in a Presidential election]." The court held that since "the plaintiffs in this action do not fall within the group specified in § 437h, . . . they are not entitled to . . . expedited review . . . ." The district court did not dismiss the action, however, holding that it did have jurisdiction over appellants' claims under its ordinary federal question jurisdiction, 28 U.S.C. § 1331.

Plaintiffs then moved for the district court to certify the question of whether appellants were plaintiffs entitled to invoke § 437h for interlocutory appeal under 28 U.S.C. § 1292(b). The district court granted that motion and this court granted appellants' subsequent motion for leave to take this appeal.

I.

Construction of § 437h must begin with the language of the statute itself. Subsection (a) of §437h is the provision for instituting actions for review of the Act and for certifying constitutional questions to the court of appeals sitting en banc. Subsection (a) provides:

> (a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

It is clear that the plaintiffs here do not fall within any of the three types of plaintiffs described in the first sentence of subsection (a). The question is, therefore, whether Congress intended to exclude all other plaintiffs from invoking the provisions of § 437h by naming the three types found in the statute. The district court so held and the defendants support that position on this appeal. The plaintiffs, on the other hand, contend that the purpose of § 437h is to provide expedited review of all challenges to any of the provisions of the Act and that Congress intended to expand notions of standing to achieve that purpose. They conclude that the purpose for naming the three types of plaintiffs specified was not to exclude other plaintiffs, but to remove any doubt that the specified plaintiffs would have standing.

The language of subsection (a) supports the plaintiffs' construction. The first sentence itself, after specifying three types of eligible plaintiffs, authorizes suits "to construe the constitutionality of *any provision* of this Act" (emphasis added). This language indicates that Congress intended that constitutional challenges could be brought in the federal courts under § 437h against every part of the Act. On the other hand, if the specification of the three types of plaintiffs limits the use of § 437h to those plaintiffs, it is unlikely that every provision of the Act could be challenged under § 437h. This case illustrates the point.

The plaintiffs in this case seek to challenge provisions of the Act which regulate the activities of trade associations. If these plaintiffs cannot invoke § 437h to challenge these provisions, it is doubtful that anyone could do so. This is so because in enacting subsection (a), Congress could not grant the specified plaintiffs standing beyond the limits of Article III. Thus, even the specified plaintiffs would have to show a sufficient "personal stake" in the

outcome of such a suit to satisfy constitutional "case or controversy" requirements. *Buckley* v. *Valeo*, 424 U.S. 1, 11-12, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). In a suit like this one—challenging provisions regulating trade associations and their political action committees—it is unlikely that any of the specified plaintiffs could show any "personal stake" in the outcome. If not, under the district court's construction, § 437h would be unavailable to challenge the provisions challenged here and the apparent Congressional intent to provide expedited review to attack "any provision" of the Act would be subverted.

The second sentence in subsection (a) contains additional support for the plaintiffs' position. That sentence requires the district court to "certify *all* questions of constitutionality of this Act" (emphasis added) to the court of appeals sitting en banc. This language further focuses Congress' intent on the questions presented in a suit such as this, rather than on the identity of the plaintiffs. The direction to certify all constitutional questions indicates again that Congress intended the expedited review procedure to apply broadly to challenges to the Act.

Reading the two sentences together, we find an expressed Congressional intent that § 437h apply to all questions of the constitutionality of any provision of the Act. As noted above, this purpose would be severely restricted if the first sentence is read as an exclusive grant of standing to the three specified plaintiffs to obtain expedited review.

Further support for the plaintiffs' position is found in the overall structure provided in the Act for judicial determination of questions arising under the act. Section 437h provides for actions brought specifically to decide

the constitutionality of the Act. Section 437g contains procedures for enforcement of the Act.[2] A comparison

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[2] U.S.C. § 437g provides, in pertinent part:

Enforcement—Practice and procedure

(a)(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of Title 26 has occurred may file a complaint with the Commission. . . .

(2) The Commission, upon receiving a complaint under paragraph (1), and if it has reason to believe that any person has committed a violation of this Act or of chapter 95 or chapter 96 of Title 26, or, if the Commission, on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, has reason to believe that such a violation has occurred, shall notify the person involved of such alleged violation and shall make an investigation of such alleged violation in accordance with the provisions of this section.

(3)(A) Any investigation and paragraph (2) shall be conducted expeditiously and shall include an investigation, conducted in accordance with the provisions of this section, of reports and statements filed by any complainant under this subchapter, if such complainant is a candidate. . . .

(5) . . .

(B) If the Commission is unable to correct or prevent any such violation by . . . informal methods, the Commission may, if the Commission determines there is probable cause to believe that a violation has occurred or is about to occur, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to the amount of any contribution or expenditure involved in such violation, in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(C) In any civil action instituted by the Commission under subparagraph (B), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an

(footnote continued)

of the schemes for review under §§ 437g and 437h shows the difficulty with the district court's construction of § 437h.

(footnote continued)

amount equal to the amount of any contribution or expenditure involved in such violation, upon a proper showing that the person involved has engaged or is about to engage in a violation of this Act or of chapter 95 or chapter 96 of Title 26.

(9)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure on the part of the Commission to act on such complaint in accordance with the provisions of this section within 90 days after the filing of such complaint, may file a petition with the United States District Court for the District of Columbia.

(B) The filing of any petition under subparagraph (A) shall be made—

(i) in the case of the dismissal of a complaint by the Commission, no later than 60 days after such dismissal; or

(ii) in the case of a failure on the part of the Commission to act on such complaint, no later than 60 days after the 90-day period specified in subparagraph (A).

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the action, or the failure to act, is contrary to law and may direct the Commission to proceed in conformity with such declaration within 30 days, failing which the complainant may bring in his own name a civil action to remedy the violation involved in the original complaint.

(10) The judgment of the district court may be appealed to the court of appeals and the judgment of the court of appeals affirming or setting aside, in whole or in a part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 and Title 28.

(11) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than actions brought under this subsection or under section 437h of this title). . . .

Under § 437g, either the Commission[3] or an individual[4] may bring a civil action in a district court to enforce the Act. The decision in such an action may be appealed to the court of appeals, but will only be reviewed by the Supreme Court on a writ of certiorari.[5] Under § 437g-(a)(11), an enforcement action must be advanced on the calendar of each court ahead of all other cases, save those filed under § 437h. Since challenges to the Act could be raised as defenses in such an enforcement proceeding, § 437g provides an alternative method for obtaining judicial review of the Act. Such defensive challenges to the Act could be on either constitutional or non-constitutional grounds. And since the entire enforcement proceeding would be advanced on the calendar of each court hearing the matter, both constitutional and non-constitutional challenges raised as defenses would receive this partially expedited review.

In contrast, § 437h provides that an action brought expressly to challenge the Act on constitutional grounds should receive the even more expedited review outlined in that section and that such actions may be taken to the Supreme Court by direct appeal. And § 437g(a)(11) makes it clear that Congress intended § 437h actions to take precedence even over enforcement proceedings.

The district court's construction would add a third method for reviewing the Act. Under that construction, the present plaintiffs' constitutional challenge would not be reviewed under either of the statutorily expedited methods.

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[3] 2 U.S.C. § 437g(a)(5)(B).

[4] 2 U.S.C. § 437g(a)(9).

[5] 2 U.S.C. § 437g(a)(10). Subdivision (10) also provides for review by the Supreme Court by the certification procedure of 28 U.S.C. § 1254(3).

It would proceed through normal three-tier review under ordinary federal question jurisdiction. Thus, *non*-constitutional challenges in enforcement proceedings would receive more expeditious review than would *constitutional* challenges brought by plaintiffs other than the three specified in § 437h(a). While Congress could have discerned differences in the need for expedited review among constitutional challenges raised by different parties, it is difficult to conceive a rationale for viewing any non-constitutional challenge as more urgent than one raising constitutional questions, regardless of the identity of the plaintiffs. Moreover, there is no indication in the language of the statute that Congress did in fact perceive a greater need for speed or ultimate Supreme Court review of constitutional questions raised by the specified plaintiffs than constitutional questions raised by others.

Based on the language of § 437h and the overall scheme of judicial review provided in the Act, we hold that § 437h applies to these plaintiffs' constitutional challenge to certain provisions of the Act and that they may invoke the expedited review provision. As we have noted, the language used and the nature of the review mechanism provided in § 437h show a Congressional intent to allow speedy judicial review of all possible constitutional challenges to any provision of the Act and to make certain that such challenges would be decided by the Supreme Court. Thus three Congressional purposes are clear: comprehensive review, speedy review, and ultimate review by our highest court of constitutional challenges to the Act. The district court's construction that Congress intended to restrict standing to invoke § 437h to the specified plaintiffs is inconsistent with these expressed purposes.

There is no indication in the language of the statute of any intent to exclude any plaintiffs who have standing under traditional rules. In our view, Congress intended to

expand the limits of standing under § 437h to the extent possible under Article III. This intent is wholly consistent with the expressed purposes of the statute. Under this view, Congress' purpose for naming the three types of plaintiffs found in subsection (a) was to insure, within constitutional limits, their standing to raise constitutional challenges to the Act. Congress may well have entertained doubts about the standing of the specified plaintiffs to challenge many of the Act's provisions.[6] And Congress

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[6] At oral argument, counsel for both sides agreed that without their enumeration in § 437h(a), serious questions could be raised about the standing of each of the specified plaintiffs. The standing of the Commission to challenge the constitutional validity of the statute it was created to enforce may have been doubted on the basis of conflicting case law. Older cases held that an agency or officer has no standing in the federal courts to challenge the statute the agency or officer is bound to enforce. *Columbus & Greenville R. Co.* v. *Miller*, 283 U.S. 96, 51 S.Ct. 392, 75 L.Ed. 861 (1931); *Stewart* v. *City of Kansas City*, 239 U.S. 14, 36 S.Ct. 15, 60 L.Ed. 120 (1915); *Marshall* v. *Dye*, 231 U.S. 250, 34 S.Ct. 92, 58 L.Ed. 206 (1913); *Braxton County Court* v. *West Virginia*, 208 U.S. 192, 28 S.Ct. 275, 52 L.Ed. 450 (1908); *Smith* v. *Indiana*, 191 U.S. 138, 24 S.Ct. 51, 48 L.Ed. 125 (1903). *See also Akron Bd. of Ed. v. Bd. of Ed. of Ohio*, 490 F.2d 1285, 1296 (6th Cir. 1974) (Weick, J., dissenting). The authority of these cases is now questionable, although they have not been overruled. *See Bd. of Ed.* v. *Allen*, 392 U.S. 236, 241 n.5, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); *City of New York* v. *Richardson*, 473 F.2d 923, 933 (2nd Cir. 1973); *Aguayo* v. *Richardson*, 473 F.2d 1090, 1100 (2nd Cir. 1973). *See generally* Hart and Wechsler, The Federal Courts and The Federal System 182 (2d ed. 1973).

Congressional doubts about the standing of political parties and voters may have been based on the fact that challenges to much of the Act by such plaintiffs might be viewed as asserting either "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens" or the rights of third parties. Such a view might lead to a finding of no standing under prudential rules. *Warth* v. *Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975).

apparently thought that it was important that those plaintiffs, in addition to others with obvious personal interest in the restrictions imposed by the Act,[7] be allowed to test the constitutionality of the Act. Each of the specified plaintiffs has a generalized interest in the operation of the entire Act, which may not have provided standing under the prudential rules of the federal courts, *see Warth* v. *Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), but which Congress may have deemed sufficiently important, due to the central role of each specified plaintiff in the election process, to justify a Congressional grant of standing.[8] *Warth* v. *Seldin*, *id.* at 501.

II.

The sparse legislative history of § 437h adds little to the analysis of its purpose.[9] As to case law, the decisions

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[7] Persons with this kind of interest in the Act would include candidates and the plaintiffs in this case due to the direct regulation of their conduct by the Act. This direct action of the statute upon such persons brings them squarely within traditional notions of standing to assert the invalidity of the imposed restrictions.

[8] It should be noted that the doubts about standing discussed here are distinguished from those expressed earlier regarding the standing of the specified plaintiffs to undertake the challenges asserted by the plaintiffs here. There it was doubted whether the specified plaintiffs could show a sufficient personal stake to have standing in the constitutional sense to attack those provisions. If not, § 437h could not be invoked by anyone to mount such an attack if the district court's narrow reading of the statute were accepted. Here we discuss doubts possibly held by Congress under prudential standing rules, as to the standing of the specified plaintiffs to seek review of any provision of the Act. It is clear from *Warth*, *supra*, that Congress had the power to remove any such doubts and to grant standing to the limits of Article III.

[9] Only two references to § 437h in the debates over the Act have been cited by the parties or found by our research. In introducing the amendment which added § 437h, Senator Buckley said:

(footnote continued)

in *Buckley* v. *Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.E.d.2d 659 (1976) *aff'g in part and rev'g in part*, 171 U.S.App. D.C. 172, 519 F.2d 821 (1975), strongly support our construction of § 437h. In *Buckley*, the original plaintiffs included four individuals and the following organizations: the Committee for a Constitutional Presidency—McCarthy '76, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc. It is clear that few, if any, of these organizations could be classified as the "national committee of any political party" so as to fit within the specified groups in § 437h. The district court in *Buckley*, in certifying

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(footnote continued)

> [I]t is a modification that I am sure will prove acceptable to the managers of the bill. It merely provides for the expeditious review of the constitutional question I have raised. I am sure we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time.

120 Cong.Rec. 10562 (1974). And in the House, Representative Frenzel said:

> I believe within this conference report there are at least 100 items questionable from a constitutional standpoint. Any time we pass legislation in this field we are causing constitutional doubts to be raised. . . .
>
> I do call the attention of the gentleman to the fact that any individual under this bill has a direct method to raise these questions and to have those considered as quickly as possible by the Supreme Court.

120 Cong.Rec. 35140 (1974). Neither statement addresses the issue of who may invoke § 437h and who may not; both merely restate the purposes expressed in the statute that review be speedy and that the questions be answered by the Supreme Court.

the case to the court of appeals, impliedly read § 437h as the district court here did, as an exclusive grant of standing to the parties specified. The *Buckley* court held that the four individual plaintiffs had standing and explicitly left to the court of appeals the question of the standing of the organizational plaintiffs.[10]

The court of appeals, however, expressed no similar reservations about the standing of the organizational plaintiffs and remanded the case to the district court for the taking of necessary evidence and certification of resulting constitutional questions, without dismissing any of the named plaintiffs. Moreover, the court of appeals granted leave to intervene to three more organizations, the Center for Public Financing of Elections, Common Cause, and the League of Women Voters, none of which even arguably fit within the groups specified in the statute. Finally, in its opinion on the merits, the court of appeals described § 437h as "a broad grant of legislative standing to sue . . ." and considered only whether that grant was so broad as to violate the Article III case or controversy requirement, without reference to the standing of the or-

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[10] After holding that the individual plaintiffs had standing to seek review under § 437h, the district court said:

> It is not so clear, however, that each of the five organizational plaintiffs possesses the same requisite standing. This is so because obviously none is eligible to vote for the office of President in any election. It is unclear, in the present procedural posture of plaintiffs' case, whether any of the named organizational plaintiffs may be "the national committee of any political party" within the meaning of the relevant statute. Since at least some of the plaintiffs have the requisite standing, and since the ultimate decision as to the standing of others may have to await further exploration, in the interests of time, this Court defers to the Court of Appeals on that issue.

ganizational plaintiffs still present in the case. 519 F.2d at 850-851.[11]

The strongest authority for our decision is the Supreme Court's treatment of the standing issue in *Buckley*. After noting the presence of the organizational parties to the case, the Court turned to the issue of jurisdiction and said:

> It is clear that Congress, in enacting [§ 437h], intended to provide judicial review to the extent permitted by Art. III. In our view, the complaint in this case demonstrates that at least some of the appellants have a sufficient "personal stake"[10] in a determination of the constitutional validity of each of the challenged provisions. . . .

424 U.S. at 11-12, 96 S.Ct. at 631. Footnote 10 from the quoted part of the opinion stated in part: "This Court has held, for instance, that an organization 'may assert, on behalf of its members, a right personal to them to be protected from compelled disclosure . . . of their affiliation.' *NAACP* v. *Alabama*, 357 U.S. 449, 458, 78 S.Ct. 1163,

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[11] We are aware that two members of the D.C. Circuit appear to have since espoused a narrow construction of the standing granted by § 437h. *See Clark* v. *Valeo*, 182 U.S.App.D.C. 21, 40, 559 F.2d 642, 661 (1977) (Leventhal, J., concurring); *id.* 182 U.S.App. D.C. at 46 and 53, 559 F.2d at 667 and 674 (Robinson, J., dissenting). We regard these apparent views as inconsistent with the position taken by the whole court in *Buckley* in accepting all of the original plaintiffs and in allowing intervention by other organizations. Cf. *Clark*, *id.* 182 U.S.App.D.C. at 32-36, 559 F.2d at 653-657 (Tamm, J., concurring) (three judges discussed the standing of the United States to invoke § 437h without reference to the list of plaintiffs in the statute and concluded that the United States lacked standing because it could not show any "injury in fact" to satisfy Art. III.)

1170, 2 L.Ed.2d 1488 (1958). . . ." We cannot read the quoted language as other than a clear holding that Congress intended to expand traditional notions of standing to the limits of Article III. And footnote 10 makes it clear that organizations may have standing under § 437h if they otherwise meet the requirements for "associational standing." *See Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).[12]

In sum, the decisions in *Buckley* fully support our construction of § 437h(a) and our holding that the plaintiffs in this case have standing to invoke its expedited review procedure.

III.

The district court, because of its jurisdictional stance, refused to certify any constitutional questions raised by the complaint. In addition, counsel for the defendants represented at argument that there are disputed fact

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[12] We have held recently that a trade association had "organizational standing" to challenge local ordinances authorizing inspection of meat delivery vehicles, applying the test set out in *Hunt, supra*. *Chicago-Midwest Meat Association* v. *City of Evanston*, 589 F.2d 278 (7th Cir. 1978). It is clear that some of the trade associations here also satisfy the *Hunt* test. The complaint alleges that the challenged provisions of the Act violate the First Amendment rights of the organizations and their members, some of whom are individuals, by interfering with the organizations' ability to gather and expend funds to express their views on political matters. From this it appears that (1) the individual members of the organizations would have standing under § 437h and could show a personal stake in the constitutional questions raised; (2) the First Amendment questions are germane to the political purposes of the organizations here; and (3) since the complaint seeks only declaratory and injunctive relief, participation of the individual members is not required. *See Chicago-Midwest Meat Association, supra*, 589 F.2d at 280-281.

issues in the case. For these reasons, the case will be remanded to the district court for the certification required by § 437h(a). On remand the district court should: (1) identify the constitutional and fact issues raised by the complaint; (2) take whatever evidence the court finds necessary to a decision of those issues; (3) make findings of fact; and (4) certify the assembled record and the constitutional questions arising therefrom to this court for decision pursuant to § 437h. The district court should, of course, expedite the above procedures to the greatst possible extent.

The order of the district court denying certification under 2 U.S.C. § 437h(a) is reversed and the case is remanded for further proceedings consistent with this opinion.

TONE, Circuit Judge, concurring.

If it were not for *Buckley* v. *Valeo*, 424 U.S. 1, 11-12, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), I would have more doubt about the meaning of the statutory language than is expressed in the opinion of this court. The view adopted by the Supreme Court in that case, however, governs us, and I therefore concur in the judgment.

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No. 80-1481

In the Supreme Court of the United States

OCTOBER TERM, 1980

BREAD POLITICAL ACTION COMMITTEE, NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION, LUMBER DEALERS POLITICAL ACTION COMMITTEE, NATIONAL RESTAURANT ASSOCIATION, and the RESTAURATEURS POLITICAL ACTION COMMITTEE,

Appellants,

vs.

THE FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLANTS

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THE FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLANTS

QUESTIONS CERTIFIED

1. Whether 2 U.S.C. §441b(b)(4)(D), both facially and as applied, infringes appellants' right of assembly guaranteed by the First Amendment.*

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* The form and phrasing of the first certified question is the district court's. In our request for certification, the question was broadly phrased—"whether 2 U.S.C. §441b(b)(4)(D), both facially and as applied, violates the First Amendment." *See* Record at 70. The breadth of the question was dictated by the scope of our Complaint which alleged that the Act was "an unconstitutional abridgement of plaintiffs', *their members' and their members' employees'* rights of freedom *of speech and* association in that:

"(a) By conditioning Plaintiffs' right to communicate on corporate consent, § 441b(b)(4)(D) imposes a prior restraint on the expression of political thoughts and ideas;

"(b) Section 441b(b)(4)(D) constitutes an impermissible burden on the right of the Plaintiffs to solicit contributions, thereby resulting in an improper restraint on Plaintiffs' rights to communicate with members of the electorate;

"(c) Section 441b(b)(4)(D), by restricting the class of permissible solicitees to stockholders and executive and administrative personnel (and families) of member corporations, impermissibly interdicts Plaintiffs from having the opportunity to associate with anyone other than those defined in the Act;

"(d) Section 441b(b)(4)(D) deprives Plaintiffs of the right to freely associate with large segments of the electorate who have or may have an affinity of interest with Plaintiffs, and it prevents that segment of the electorate from having the opportunity to associate with Plaintiffs toward common political ends;

"(e) Section 441b(b)(4)(D)'s restriction that only one trade association can solicit the stockholders and executive and administrative personnel of a given mem-

(footnote continued)

2. Whether 2 U.S.C. §441b(b)(4)(D), both facially and as applied, deprives appellants of liberty without due process of law in violation of the Fifth Amendment.

3. Whether the failure of the Federal Election Campaign Act Amendments of 1976 to define the term "solicitation" infringes appellants' right of assembly guaranteed by the First Amendment, or deprives appellants of liberty without due process of law in violation of the Fifth Amendment.

(footnote continued)

ber corporation impermissibly and absolutely restricts the communication of political expression by any and all other trade associations and impermissibly curtails the right of Plaintiffs and large segments of the electorate to freely associate with each other. * * *" Joint Appendix ("J.A.") at 24-25 (Emphasis supplied). *See also* J.A. at 23, ¶ 26.

The district court was directed by the Seventh Circuit to "identify the constitutional and fact issues *raised by the complaint*" and to certify those questions to the Court of Appeals. *See* Bread Political Action Committee v. FEC, 591 F.2d 29, 36 (7th Cir. 1979) (Emphasis supplied). The minority opinion dealt with each of the questions raised in our Complaint and subsumed in the first question posed for certification by the Appellants.

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OPINIONS BELOW

The *En Banc* opinion of the court of appeals is reproduced as Appendix A to Appellants' Jurisdictional Statement and is reported at 635 F.2d 621 (7th Cir. 1980). The earlier panel decision of the court of appeals sustaining jurisdiction pursuant to 2 U.S.C. §437h is reproduced as an Appendix to Appellants' Reply to Motion of the Federal Election Commission to Dismiss the Appeal and is reported at 591 F.2d 29 (7th Cir. 1979).

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1980. Notice of Appeal to this Court was filed on December 18, 1980. (See Appellants' Jurisdictional Statement, Appendix B.) Appellants' Jurisdictional Statement was filed on March 2, 1981. On July 2, 1981, probable jurisdiction was postponed until a hearing on the merits. The jurisdiction of this Court rests on 2 U.S.C. §437h.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in Appellants' Jurisdictional Statement as Appendix C.

STATEMENT

Summary

This case raises delicate and significant questions concerning the constitutionality of those provisions of the 1976 Amendments to the Federal Election Campaign Act ("the Act")[1] which regulate the solicitation activities of trade associations and their separate segregated funds, commonly known as political action committees or "PACs".[2]

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[1] 2 U.S.C. §431 *et seq.*

[2] The importance and delicacy of the questions involved is best exemplified by the Commission's own acknowledgement below that this case presents "serious constitutional issues" which "go to the heart of" and which have "potential far reaching impact on the . . . Act. . . ." (*See* Jurisdictional Statement at 7, n.11).

Following protracted proceedings in the district court and the court of appeals,[3] the district court made elaborate factual findings[4] regarding, inter alia, the impact of the Act on the solicitation activities of the appellants.[5] The district court found that §441b(b)(4)(D) (App. C, Appellants' Jurisdictional Statement, at 52) had "substantially" curtailed appellants' solicitation activities[6] and their ability to engage in other forms of protected political speech and association. The court also found that the Act had limited the right of persons with similar or related interests to receive from the appellants communications expressing political ideas, opinions, views and beliefs and to associate with the appellants. (Findings 189-194; 197-198; 200).

The district court found that but for the restrictions of §(D), plaintiffs would engage, as they had in the past, in a broad range of solicitation activity directed to those persons with whom there is an affinity of interest. (Findings 108; 140; 144; 199). Indeed, prior to May, 1976, the appellants had solicited voluntary contributions from individuals who shared their political and economic goals, without regard to whether the potential contributor was an

[3] *See infra* at 6.

[4] These Findings are collected in a separate unnumbered volume in the Record and are reproduced in the Joint Appendix at 48-105.

[5] Appellants are the National Restaurant Association ("NRA"); the Restaurateurs Political Action Committee ("RPAC"); the National Lumber and Building Material Dealers Association ("NLBMDA"); Lumber Dealers Political Action Committee ("LuDPAC"); and the Bread Political Action Committee ("Bread-PAC"), the political action committee of the American Bakers Association.

[6] An integral part of these solicitation activities prior to the 1976 Amendments, as well as today, involves discussion and espousal of the political and social ideas, opinions, views and beliefs of each plaintiff concerning matters of national concern and of concern to their respective industries. (Findings 188; 196). *See* note 9, *infra*.

executive or a stockholder of the corporations which comprised the membership of the particular association. These solicitations, which were undertaken at the trade associations' regularly scheduled conventions and meetings and by telephone and mail, were conducted without first having obtained permission from the member corporations (Findings 55-56; 95-97; 120; 123-24; 195).

With the enactment on May 11, 1976 of the Federal Election Campaign Act Amendments of 1976, trade associations were compelled to drastically alter their solicitation activities. Under the Act, trade associations were now permitted only to solicit contributions from the stockholders and the executive and administrative personnel of their corporate members.[7] Moreover, §441b(b)(4)(D) mandated, as an indispensable precondition to such solicitation, that trade associations first obtain the written permission of the member corporation. Once obtained, that permission is operative only in the calendar year in which it is given; and permission can be given by the member corporation only to one trade association PAC, regardless of the number of trade associations to which the particular corporation may belong.[8] Solicitation without compliance with these strictures subjects the solicitor to the criminal and civil sanctions of the Act.

The impact of §(D) on the rights of the appellants and potential solicitees was profound and immediate. In the case of LudPAC, it caused a total cessation of all solicitation activity (Findings 54-58). BreadPAC and RPAC were only scarcely less affected by the throttling restraints of §(D), which have had their intended effect of severely

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[7] While a corporate trade association is also permitted to solicit its *own* executive personnel and stockholders, this category of permissible solicitees is so small as to be virtually non-existent. *See infra* at 43-45.

[8] Findings 98; 140; 144. No comparable restrictions are imposed upon union, corporate or independent PACs. (Finding 201).

limiting the number of individuals to whom solicitation materials could be sent.[9]

In 1975, BreadPAC solicited approximately 1250 individuals. Of this number, approximately 311 contributed a total of $40,190.00. Between January 1, 1976 and May 11, 1976, BreadPAC solicited 1904 individuals. Subsequent to May 11, 1976, the effective date of the Act, all actual solicitation activities ceased and could not be resumed again until the ABA corporate members had given their written approval. As a result, only 462 individuals were solicited from May 11, 1976 through December 31, 1976. (See Plaintiffs' Exhibits 1-24; 1-26).

Again in 1977, there was a dramatic decrease in the number of individuals who could be and were solicited by BreadPAC. In that year, only 577 individuals were allowed by their employers to be solicited. Of this number, only 195 actually made contributions totaling $28,000.00. Of the 7,509 members of the National Restaurant Association in 1977, only 1,087 gave permission to solicit; 6,422 denied permission either explicitly or by failing to respond. (Findings 100-01).

Of perhaps even greater significance was RPAC's inability to solicit the 100,000 people who attended the 1977 NRA Convention in Chicago. Because of the potential im-

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[9] These materials are not tawdry demands for money. Rather, they seek to inform prospective contributors of the PAC's activities, and they speak to the need for likeminded people to associate with each other and to use the PAC as a vehicle for making non-partisan political contributions to those candidates whose views are most consonant with those of the particular industry. Indeed, running throughout these materials is the oft-repeated theme that individual contributions, insignificant in themselves, can be maximized if aggregated through a PAC. See Plaintiffs' Exhibits 1-01-12; 1-16; 1-19-1-23; 2-01; 3-01; 3-03; 3-05; 3-07-09; 3-12-13. Plaintiffs' Exhibits are collected in a separate black binder which is part of the Record. Since the Exhibits each bear the caption "Plaintiffs' Exhibit", we have used that designation in referring to a particular exhibit.

position of criminal and civil sanctions for impermissible solicitation, RPAC found it difficult to enlist people willing to solicit at the Convention. And since it was administratively impossible to cull out the handful of permissible solicitees from those individuals who were not authorized to be solicited, RPAC was forced to abandon any efforts to solicit at the 1977 Convention. (Findings 102-103).

The inhibiting impact of §(D) again was felt in 1978. In that year, the number of persons whom ABA members gave BreadPAC permission to solicit dropped to 421. Of this number, 205 contributed $29,550.00.[10] RPAC also was profoundly affected. Not only was there no solicitation of the 100,000 attendees at the 1978 NRA convention,[11] but the number of individuals authorized by their employers to be solicited by mail dropped precipitously. Of the 15,759 requests to NRA members for permission to solicit their executives, (*see, e.g.*, Plaintiffs' Exhibits 3-04; 3-06; 3-10), only 1,168 members gave permission to solicit a total of 3,196 individuals. Of those solicited, only 393 persons made contributions. (Findings 104-106).

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[10] Findings 128; 139; Plaintiffs' Exhibits 1-26; 1-30. The effect of §(D) on BreadPAC are illustrated in graphic form in Appendix A, *infra*. The Act has also resulted in greatly increased costs and has imposed on BreadPAC additional and cumbersome administrative burdens. (Findings 132-137; Plaintiffs' Exhibit 1-13(a)).

[11] The same situation obtained at the 1979 NRA Convention, where the *in terrorem* effect of §(D) also operated to prevent the late Colonel Harlan Sanders, the founder of Kentucky Fried Chicken, from speaking to the Convention. The Colonel, at RPAC's request and on its behalf, was to address those attending the Convention about RPAC's goals and its political significance. However, since it was uncertain whether such a speech would be construed as a solicitation, and since many of the 100,000 attendees were not within the narrow range of statutorily permissible solicitees, the Colonel was afraid to and did not deliver his speech. (Findings 108-09).

The Proceedings and Opinions Below

In response to the devitalizing impact of §(D), the appellants filed a complaint against the FEC in the United States District Court for the Northern District of Illinois.[12] In December, 1979, the court of appeals held that it and not the district court was the proper forum for initial resolution of the plaintiffs' constitutional challenges. *See Bread Political Action Committee* v. *FEC*, 591 F.2d 29 (7th Cir. 1979). Accordingly, it directed the district court to make findings of fact, prepare a certified record, and identify and certify the constitutional issues raised by the complaint. *Id.* at 36.

Following extensive discovery, the district court certified four constitutional questions to the court of appeals. (J.A. at 105).[13] That court, sitting *en banc* as the court of first impression pursuant to 2 U.S.C. §437h, unanimously reaffirmed its prior holding (*see* 591 F.2d 29) that the plaintiffs had standing to invoke the expedited review provisions of §437h, which the court held embraced claims of unconstitutional application of the Act as well as claims of facial unconstitutionality. In addition, the court unanimously

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[12] The complaint charged that §(D), both facially and as applied: (i) constituted an unconstitutional prior restraint in violation of the First Amendment; (ii) that it abridged the speech and associational rights of the plaintiffs, of those executive and administrative personnel and stockholders of the corporations which comprised the trade associations' memberships, and of those persons who shared an "affinity of interest" with plaintiffs, (iii) that it deprived the plaintiffs of due process of law in violation of the Fifth Amendment in that it imposed substantially dissimilar restrictions upon trade association PACs than were imposed on corporate, union, membership organization, and independent PACs; and (iv) that it was impermissibly vague and overbroad. (J.A. at 24-26, 43).

[13] We seek review by this Court only of questions 1, 2 and 3.

rejected as "frivolous" the FEC's contention that the case did not present a justiciable controversy.[14] 635 F.2d at 625.

However, the court of appeals was sharply divided on the question of whether §(D), both facially and as applied, violated the First Amendment and whether it invidiously discriminated against trade associations in violation of the Due Process Clause of the Fifth Amendment. Five members of the court held that §(D) neither constituted a prior restraint nor otherwise violated the First Amendment. Chief Judge Fairchild and Judges Pell and Bauer vigorously dissented. *Id.* at 636. In addition, they held that even if §(D) did not constitute a prior restraint, it unconstitutionally abridged the speech and associational rights of not only the plaintiffs, but of potential contributors and others with whom the plaintiffs shared an affinity of interest. *Id.* at 637.

The court of appeals was also divided on the question of whether §(D) deprived the plaintiffs of due process of law. Five members of the court answered this question in the negative. The minority held that by requiring trade association PACs to obtain written permission as a precondition to soliciting a member corporation's executive and administrative personnel or their stockholders, while imposing no similar restrictions on the solicitation activities of other PACs, §(D) invidiously discriminated against trade association PACs in violation of the Fifth Amendment. *Id.* at 641.

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[14] While the court unanimously held that §(D) was neither vague nor overbroad, three judges stressed that the FEC had construed the term "solicitation" so broadly that there was a chilling effect on protected speech. See 635 F.2d at 636, n.3.

SUMMARY OF ARGUMENT

I.

To insure that "*all* questions of constitutionality" pertaining to "*any* provision" of the Federal Election Campaign Act would be heard by the Supreme Court at the earliest possible time, the Congress, in 1974, enacted 27 U.S.C. §437h. Both the text and context of that section demonstrate that its applicability is solely a function of the nature of the challenge raised rather than the identity of the plaintiff. The purpose of §437h was to expand traditional notions of standing to allow certain potential plaintiffs who, but for §437h might not have standing under this Court's prudential rules, to initiate constitutional challenges to the Act. Thus, all constitutional challenges to the Act regardless of whether they are raised by one of the three classes of plaintiffs explicitly enumerated in §437h(a) are subject to the Act's expedited review provisions.

II.

The Act prohibits trade associations and their PACs from seeking voluntary contributions from anyone other than stockholders and executive and administrative employees of corporations which comprise the membership of a particular trade association. In addition, before a trade association or its PAC can solicit even this narrow class of statutorily permissible solicitees, it must obtain the written permission of the potential contributor's corporate employer. Finally, a corporation can only grant solicitation privileges to a single trade association in any year despite the fact that the corporation, by virtue of its diverse business interests, may be a member of more than one trade association.

By prohibiting solicitations without the prior written permission of the corporate employer, who has the absolute discretion to grant or deny permission for any reason, the Act has created a system of prior restraint indis-

tinguishable in its censoring affect on speech and associational freedoms from the licensing systems consistently invalidated by this Court.

The abridgement of First Amendment freedoms wrought by the Act cannot be dismissed as insignificant merely because the appellants are free to engage in other constitutionally discrete forms of First Amendment activity. Moreover, the fact that a statute only results in a partial rather than a total paralysis of First Amendment activity does not make constitutionally palatable that which is otherwise impermissible.

Finally, no principled claim can be made that the restrictive effects on First Amendment freedoms are insignificant or marginal. For, as the district court's unchallenged Findings of Fact clearly demonstrate, the Act has substantially curtailed appellants' solicitation activities and their ability to engage in protected political speech and association. Additionally, as the district court found, the Act has limited the rights of persons with similar or related interests to receive from the appellants' communications expressing political ideas and opinions and has impaired their right to associate with the appellants in furtherance of common political aims.

III.

In addition to being a prior restraint, §(D) otherwise abridges the speech and associational freedoms of appellants and those individuals with whom they share an affinity of interest, in that §(D): (1) restricts the ability of appellants to undertake an uncensored program of solicitation with all employees and shareholders of their respective corporate members, and (2) absolutely prohibits appellants from undertaking any solicitation activity with other individuals who share the same economic, social and political goals and beliefs as the appellants themselves.

This scheme of overly broad, randomly operating restrictions and prohibitions does not further the integrity of the electoral process, nor does it foster meaningful and in-

formed participation by citizens in the political process. Rather, §(D) undermines the ability of like-minded individuals to associate through the medium of political committees and, by requiring advance approval of the individual's employer, heightens the potential for coercion in the solicitation process. Moreover, §(D) is neither necessary to, nor does it enhance, the effectiveness of the constitutionally permissible limitations upon political contributions or the elaborate disclosure mechanisms contained in the Act. In short, §(D) serves no compelling governmental interest; rather, it subverts the core purposes of the Act.

IV.

The limitations on trade association solicitation imposed by the Act are invidiously discriminatory. These restrictions, which apply exclusively to trade associations and their PACs, were intentionally imposed to limit their fundraising potential. Moreover, the Act as a whole imposes far fewer restrictions on union, corporate and independent PACs than are imposed on trade associations and their PACs. Such an intentionally discriminatory scheme is violative of the Due Process Clause of the Fifth Amendment.

V.

Section (D) has disavowed the commonly accepted dictionary definition of the word "solicitation" in favor of a broadly sweeping concept which includes "anything which fairly could be deemed a request for a contribution." A statute of such protean contours is incompatible with the First Amendment. The statutory vagueness and overbreadth have made the fundamental right to engage in political speech and association dependent upon the ever-changing episodic judgments of the FEC, which has assumed the role of a super-governmental censor regulating the speech and association of citizens throughout the Nation.

ARGUMENT

I.
JURISDICTION OVER THIS APPEAL IS PROPER UNDER 2 U.S.C. §437h

A.

The Federal Election Campaign Act as amended was the most comprehensive election reform legislation ever enacted by the Congress. Given the Act's labyrinthine complexity and its intersection with the First Amendment, it is not surprising that serious questions were raised about the constitutionality of substantial portions of the Act by those responsible for its passage. *California Medical Association* v. *FEC*, ... U.S. ..... (1981), 49 L.W. 4842, 4844 n. 7. To insure that "*all* questions of constitutionality" pertaining to "*any* provision" of the Act would be heard by *this Court* at the earliest possible time, the Congress, in 1974, enacted §437h. *Id.* at 4844-45.[15]

Both the text and context of §437h make clear that the availability of expedited judicial review under that section is a function of the nature of the challenge raised rather than the identity of the plaintiff. The first sentence of §437h authorizes three types of eligible plaintiffs to institute suits to construe the constitutionality of "*any provision* of [the] Act." (Emphasis supplied). If the Congress intended to limit expedited review to the three explicitly enumerated plaintiffs, it scarcely would have employed such all-embracing language, for it is clear that the specifically enumerated plaintiffs would not have Article

[15] See also Bread Political Action Committee v. FEC, 591 F.2d 29 (7th Cir. 1979), *aff'd*, 635 F.2d 621 (7th Cir. 1980) (*En Banc*).

III standing to contest many of the basic structures of the Act. *See BreadPAC, supra,* 591 F.2d at 31.[16]

The same purposeful use of encompassing language also appears in the second sentence of §437h which mandates, without regard to the identity of the particular plaintiff, that the district court shall immediately certify "*all* questions of constitutionality of" the Act to the court of appeals sitting *en banc.* (Emphasis supplied). "This language further focuses Congress' intent on the questions presented in a suit such as this, rather than on the identity of the plaintiffs. The direction to certify all constitutional questions indicates again that Congress intended the expedited review procedure to apply broadly to challenges to the Act. * * * [T]his purpose would be severely restricted if the first sentence is read as an exclusive grant of standing to the three specific plaintiffs to obtain expedited review." *BreadPAC, supra,* 591 F.2d at 31.

It is difficult to imagine anyone more personally affected by, or interested in, the provisions of the Act dealing with trade associations and their political action committees than trade associations themselves. Yet, acceptance of a narrow construction of §437h would permit parties having no real and substantial interest in matters affecting trade

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[16] There exists the very substantial question whether the latter two classes of plaintiffs enumerated in §437h could in fact maintain an action contesting the Act's trade association provisions. While Congress has the power to accord standing to parties who might otherwise be barred by this Court's "prudential" rules relating to standing, it cannot, by virtue of the case or controversy requirement of Article III, accord standing to a potential litigant who cannot allege and prove a distinct and palpable injury to himself. *See* Warth v. Seldin, 422 U.S. 490, 498-501 (1975). Since it is unlikely that the parties enumerated in §437h could demonstrate such an injury resulting from the Act's trade association provisions, a narrow construction of §437h could theoretically result in a situation in which no one would have standing to initiate judicial review of the Act's trade association provisions under the Declaratory Judgment Act. 591 F.2d at 34, n.36.

associations to seek expedited judicial review of the Act's trade association provisions but would deny that right to those most directly and substantially affected by the Act.

Since, in enacting §437h Congress sought to insure prompt evaluation of the constitutionality of "*any* provision" of the Act, it would not have denied standing to the class most intimately affected by those provisions dealing with trade associations. For prompt evaluation of those provisions would surely not result if *only* the Commission, the national committee of a political party or a voter had standing to seek expedited review in the courts of appeals. It is fatuous to suggest that some anonymous individual, or the national committee of a political party would contest the Act's trade association provisions. And it is idle to contend that the Commission would ever raise a constitutional challenge to the Act upon which it depends for its very sustenance.[17] In sum, restricting §437h to the three classes of enumerated plaintiffs would subvert rather than achieve the goals subserved by that section. *Id.* at 33.

B.

This thesis is supported by *Buckley* v. *Valeo*, 424 U.S. 1 (1976). *Buckley* involved broadbased challenges to various provisions of the Federal Electon Campaign Act by individuals and incorporated and unincorporated public interest groups. Despite the fact that the overwhelming majority of the plaintiffs and intervenors were *not* within the parties enumerated in §437h, this Court held that "at least some of the appellants [had]

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[17] The FEC's demonstrated insensitivity to basic First Amendment values, *see, e.g.*, CLITRIC v. FEC, 616 F.2d 45, 53 (2d Cir. 1980) (*En Banc*) (Kaufman, C. J., concurring), and its self-serving tergiversation on fundamental questions concerning the Act's meaning, *see, e.g.*, California Medical Association v. FEC, *supra*, 49 L. W. at 4844, n.8, preclude any argument to the contrary.

a 'sufficient personal stake' in a determination of the constitutional validity of the Act. . . ." *Id.* at 12.

Immediately after this statement, the Court noted that an organization may assert, on behalf of its members, rights personal to them. 424 U.S. at 12, n. 10. This focus on the organizational rather than the individual plaintiffs takes on heightened significance when one recalls that the *district court's* invocation of §437h was predicated solely on the existence among the plaintiffs of eligible voters.[18] This Court, however, manifestly ignored the fact that there were voter-plaintiffs and focused instead on the institutional plaintiffs.

Given the district court's inordinate preoccupation with the status of the *individual* plaintiffs, unless we are to ascribe to this Court an exceedingly high degree of caprice, *Buckley's* focus on the *organizational* plaintiffs, must be construed to mean that the availability of §437h(a) is not limited merely to the three classes of plaintiffs enumerated in that section. *See BreadPAC supra,* 591 F.2d at 35-36.

Other portions of *Buckley* also conclusively demonstrate the spacious reach of §437h. It is obvious that restricting the availability of judicial review only to the Commission, the national committee of a political party, or a voter would *not* provide judicial review to the extent permitted by Article III. Yet, this Court in *Buckley* unequivocally stated that "*[i]t is clear that Congress in enacting 2 U.S.C. §437h . . . intended to provide judicial review to the extent permitted by Article III.*" 424 U.S. at 11-12. (Emphasis supplied). *See BreadPAC, supra,* 591 F.2d at 35. Restricting the reach of §437h to the three classes of expressly enumerated plaintiffs not only would prevent prompt judicial evaluation of the Act, but, in practical effect, would foreclose any challenge to substantial portions of it. *See supra* at 11-12.

[18] *See* Buckley v. Valeo, 387 F. Supp. 135, 142, n.14 (D.D.C. 1975).

C.

Finally *California Medical Association* v. *FEC*, ... U.S. ..... (1981), 49 L.W. 4842, confirms the accuracy of the Seventh Circuit's construction of §437h. At issue in *California Medical* was the question of whether a plaintiff could institute a §437h action following the initiation of an enforcement proceeding by the FEC under §437g.

In rejecting "the cramped construction of the statute proposed by the Commission" as dissonant with and subversive of §437h's goal of expedition in appellate review of constitutional challenges to the Act, *id.* at 4845, the Court emphasized that it was the nature of the challenge to the Act that determined the availability of review under §437h, not the fortuity that there was a pending enforcement proceeding. *See id.* at 4845.

Just as constitutional "questions may arise regardless of whether a Commission enforcement proceeding is contemplated," *id.* at 4845, so too may they arise regardless of the identity of the particular plaintiff initiating the challenge. Yet, "under the Commission's approach even the most meritorious and fundamental challenge to the Act could not be reviewed pursuant to §437h but instead could be considered only pursuant to", *id,* at 4845, the totally unexpedited review procedures employed in federal question cases.

However, if 28 U.S.C. §1331 rather than §437h is to be the fount of jurisdiction in cases such as the one at bar, the following anomalous situation would obtain: instead of expedited, initial resolution of constitutional questions by a Court of Appeals *en banc,* followed by expedited appellate review by this Court (437h(c)), the case would first be decided by a district judge, on a non-expedited basis, subject only to review by a three judge panel of a court of appeals, also on a non-expedited basis. The decision of the court of appeals would then be subject to this Court's *discretionary* review on a non-expedited basis pur-

suant to a petition for *certiorari*. This kind of protracted, multi-tiered judicial review of constitutional challenges to the Act, with its inevitable delays and the uncertainty of ultimate review by this Court, is precisely what §437h was designed to obviate. *See BreadPAC, supra,* 591 F.2d at 33.[19]

In sum, properly construed, §437h is not, as the FEC has twice unsuccessfully argued, a statutorily imposed *restriction* on the availability of expedited judicial review in the courts of appeals and this Court. Rather it represents Congress' desire to *expand* traditional notions of standing so as to allow certain potential plaintiffs who, but for §437h, might not have standing under this Court's prudential rules, to institute actions in the district court. (*See* Affidavits of Senator Buckley and David Keene (J.A. at 107-112). The Seventh Circuit's construction invigorates the Act; the Commission's saps its life by subverting the animating and core purpose underlying §437h. A choice between the two is not hard.

II.

SECTION (D), BOTH FACIALLY AND AS APPLIED, CONSTITUTES A PRIOR RESTRAINT ON THE SPEECH AND ASSOCIATIONAL FREEDOMS OF PLAINTIFFS AND THE EXECUTIVE AND ADMINISTRATIVE PERSONNEL OF THEIR CORPORATE MEMBERS

A.

The Act prohibits trade association PACs from seeking voluntary contributions from anyone other than stockhold-

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[19] Relegating to ordinary federal question jurisdiction constitutional challenges brought by plaintiffs other than those specified in §437h would also result in the following anomaly: regardless of the identity of the defendant, *non*-constitutional challenges raised in enforcement proceedings brought by the Commission would receive the expedited review specified in §437g(a)(11), while *constitutional* (footnote continued)

ers and executive and administrative employees of a corporation which is a member of the particular trade association. In addition, the Act requires that before a trade association PAC can solicit even this narrow class of statutorily permissible solicitees, it first must be granted written permission by the member corporation. 2 U.S.C. §441b(b)(4)(D).[20]

Under the regime of censorship compelled by §(D), corporations have the unbridled power to determine whether they will allow their stockholders or executives to receive political solicitations from the trade association to which they belong. There are no criteria to guide these censorial decisions; instead "the yea or nay saying by [corporate] officials becomes the standard of the permissible." *Joseph Burstyn* v. *Wilson*, 343 U.S. 495, 532 (1952) (Frankfurter, J., concurring). There is no review either by an administrative or judicial body of the corporate censor's arbitrary determination of whether it will allow a communication between a PAC and one or more of its stockholders or employees, and the potential recipient has no voice in the matter. Finally, no time frame is established within which the corpor-

(footnote continued)
challenges brought by anyone not explicitly enumerated in §437h would receive no preferential treatment at all. "While Congress could have discerned differences in the need for expedited review among constitutional challenges raised by different parties, it is difficult to conceive a rationale for viewing any non-constitutional challenge as more urgent than one raising constitutional questions, regardless of the identity of the plaintiffs." BreadPAC, *supra*, 591 F.2d at 33.

[20] The member corporation cannot give permission to more than one association PAC each year even though the corporation may be a member of two or more separate distinct associations. Finally, permission once granted is only good for the *calendar* year in which given and must be renewed annually.

ation must respond to a solicitation request.[21] In fact, the Act does not even require the corporate censor to respond, in which event, the failure to respond is treated as a denial of permission.[22]

Despite the operative effect of §(D) and despite its devitalizing impact on the speech and associational rights of literally millions of American citizens,[23] the majority, without any analysis, held that §(D) was not a prior restraint and that any prior restraining effects were, at best, "tenuous" and "marginal' ". 635 F.2d at 628, 629.

This conclusion, which sedulously ignored the district court's unchallenged contrary findings of fact, *id.* at 625, seems to be predicated upon the following premises: solicitation is a form of "political expression" protected by the First Amendment; plaintiffs are engaged on a daily

[21] This is precisely the sort of "freeze" forbidden by the First Amendment. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[22] In 1978, only 6% of the American Bakers Association's members expressly refused permission to solicit; 59% failed to respond to the ABA's requests. The result was that the employees and stockholders of 65% of the companies comprising the ABA could not be solicited. The percentage of ABA members not responding to requests to solicit was double that in 1976. (Finding 128).

[23] Since most trade associations are comprised of corporations (Finding 2), the censorial effect of §(D) is staggering. For example, of the 1600 corporate members of the Direct Mail Marketing Association, only 75 gave permission to solicit a total of 90 individuals in 1978 even though the total pool of permissible (employee) solicitees numbered from 100,000 to 300,000. (*See* Deposition of Francis Andrews at 43-46; 140-47). In 1978, RPAC sent almost 16,000 separate requests to NRA member corporations seeking permission to solicit. Only 1,168 members granted permission to solicit approximately 3,000 individuals, 393 of whom actually contributed. (Findings 104-06) Similarly in 1978, only 35% of the corporations comprising the membership of the American Bakers Association granted permission to BreadPAC to solicit a total of 421 individuals. (Findings 128; 139).

basis unimpeded by §(D), in many *other* forms of "political expression" protected by the First Amendment; therefore, the restraining effects of §(D) on solicitation are constitutionally insignificant since the overall quantum of "political expression" is not materially affected. 635 F.2d at 628.

B.

The flaws in this reasoning are manifold. First the majority overlooked the constitutionally significant fact that solicitation for political contributions is a discrete form of First Amendment activity, separate and distinct from other forms of protected speech and association.[24] That is, while solicitation may be described as a form of "political expression," it is not a fungible part of some monolithic whole encompassing all the varied speech and associational activities which fall within the ambit of the First Amendment. By indiscriminantly characterizing the appellants' widely disparate First Amendment activities, including solicitation, as "political expression" and treating them as identical strands in a seamless web, the majority evaded rather than answered the question of whether §(D) constituted a prior restraint on speech *and associational* freedoms.[25] Moreover, as the minority demonstrated, the fact that a statute only results in a partial, rather than a total, paralysis of First Amendment activity does not make con-

[24] Heffron v. International Society for Krishna Consciousness, Inc., ---- U.S. ----, 69 L.Ed.2d 298, 312 (1981) (Brennan, J., concurring and dissenting).

[25] The majority failed to recognize that a PAC is a separate distinct jural entity, California Medical Association, *supra*, 49 L.W. at 4846, the activities of which differ markedly from those of its related trade association. For example, it is BreadPAC and not the ABA which solicits political contributions and which informs contributors of the philosophies and campaigns of those candidates whose views are most consonant with those of the baking industry. (Finding 155). The same situation obtains with respect to the NRA and RPAC.

stitutionally palatable that which is otherwise impermissible. *See* 635 F.2d at 636.

Perhaps the most troubling aspect of the majority's conclusion that §(D) has not had a restraining effect on political association is its failure to recognize that political solicitation implicates speech and associational rights of the solicitee no less than those of the solicitor.[26] That is, abridgments of the right to solicit political contributions, perforce, affect the correlative fundamental right of the potential contributor to receive political information[27] and to engage in political association through the pooling of political contributions. The statute in the instant case constitutes a significant abridgment of these rights.

It is no answer to say that solicitees are "free" to acquire whatever information about candidates they deem appropriate. Nor are these abridgments to be dismissed as insignificant merely because §(D) does not facially prohibit voluntary contributions by corporate executives to candidates or political committees. For the operative effect of §(D) has been to allow corporate employers the arbitrary power either to delay the transmission or totally deprive citizens of the very information (namely the existence and goals of the PAC) which is essential to their

[26] This failure is especially disturbing in light of i) the explicit allegations in our Complaint that the Act violated the First Amendment rights of potential contributors (*see supra* at (I); J.A. at 23-25); ii) the district court's undisputed Findings of Fact that the Act had materially and adversely affected the rights of potential contributors to receive political information and to associate with the appellant PACs; and iii) the dissenters' emphasis on the impact of §(D) on the rights of potential solicitees. 635 F.2d at 637.

[27] *See* Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc., 425 U.S. 748, 756-57 (1976); Grosjean v. American Press Co., 297 U.S. 233, 245 (1936); BreadPAC v. FEC, 635 F.2d at 637 (dissenting opinion). *Cf.*, Madison School Dist. v. Wisconsin Emp. Comm., 429 U.S. 167, 175, n.7 (1976); United States v. CIO, 335 U.S. 106, 143-44 (1948) (Rutledge, J., concurring).

participation in one very significant aspect of the political process. This is precisely what the doctrine of prior restraint is designed to prevent. *See Nebraska Press Ass'n.* v. *Stuart, supra; Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175, 180, 182 (1968); T. Litwack, *The Doctrine of Prior Restraint,* 12 H.C.R.C.L. Rev. 519 (1977).

A full appreciation of §(D)'s impact on political association necessitates a continued perception of the realities of modern life. The halcyon uncomplicated days of the past are gone forever. "[T]he world of the Founding Fathers is not ours; nor can it ever be." Bunke, The Liberal Agony 280, 290-91 (1963). It is quixotic even to suggest that a person—any person—has the time or the resources to educate himself about the background, the political philosophies, or the aspirations of more than a few *local* candidates, if that. For the average citizen, acquisition of information about candidates in sister states is a practical impossibility. Thus, the "right" to make political contributions in support of the candidacies of those who share one's political and social philosophy is largely illusory, absent the existence of some sort of political structure which can serve as a focal point for political association. It is only through group association and pooled contributions that the average citizen, desirous of advancing deeply felt political and social beliefs through the election, on a nation-wide basis, of "sound thinking" candidates, can hope to amplify his voice and effect the political destiny of the Nation. *See Buckley* v. *Valeo,* 424 U.S. 1, 22, 65-66 (1976).

Nor, for many people, are contributions to the national committee of one of the major or minor parties a constitutionally or politically acceptable substitute for contributions to a trade association PAC. Such contributions will result in subsequent distribution of money solely on a partisan basis, without regard to the consonance of the philsophy of the initial contributor with that of the ultimate recipient.

For the millions of independent voters, such indiscriminate contributions do not allow a meaningful form of political association. And, even for individuals whose political allegiance favors a particular party, contributions to a national committee only go part way towards the election of candidates who share the contributor's deeply felt beliefs on pivotal issues.

For example, not long ago the question of sale of wheat to Russia became the cynosure of political attention. That issue was obviously of critical importance to the baking industry and to those whose economic destinies were inextricably linked to its ebb and flow.[28] For those involved in the industry, the election of candidates who would champion the goals of the industry was a matter of prime importance.

Clearly, the most meaningful and effective form of political association directed towards the nationwide support of candidates who would promote and advocate the goals of the baking industry would be political contributions to BreadPAC which would "serve as a clearing house to facilitate individual or pooled individual political participation. . . ." *California Medical Association* v. *FEC*, 641 F.2d 619, 630 (9th Cir. 1980) (*En Banc*), *aff'd*, ... U.S. ..... (1981). *See also* Complaint, Count One ¶25 (J.A. at 22).

The same situation applies, *mutatis mutandis*, to all vital questions affecting a particular industry. Contributions by association PACs are made on a non-partisan basis, to candidates whose views are most consonant with those of the industry with which the PAC is involved. Thus, the ability to make contributions to a trade association PAC provides the most meaningful—if often not the only—way of enabling corporate executives and stockholders to effectively advance, on a national scale,

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[28] The issue, of course, was of substantially more than merely economic concern, and it evoked substantial political and philosophical controversy.

certain precise and specific economic and political goals.[29] However, by conditioning the right of solicitation on the whim of the employer, §(D) operates to cut off a profoundly important avenue for political association[30]

Equally unacceptable is the majority's second basis for the conclusion that §(D) is not a prior restraint. By totally reconstituting their membership to include only individuals rather than corporations, the majority reasoned, trade associations would thus be free to solicit the individual members, unfettered by the prior permission rule of §(D). 635 F.2d at 628. The notion that the unconstitutional can be miraculously transformed into the constitutional by the alchemy of avoidance accords constitutional dignity to an irrelevance and is contrary to fundamental First Amendment precepts. *See, e.g., Southeastern Promotions Ltd.* v. *Conrad,* 420 U.S. 546, 556 (1975).[31]

[29] It is an indisputable fact of economic life that a trade association's advancement of its members' interests inures to the benefit of its members' employees. It is thus beyond cavil that executives and administrators have a common interest with their employer's trade association in the advancement and realization of commonly shared industry aspirations. *See* Deposition of Francis Andrews, 40-41, 49, 58, 111, 137-38; 635 F.2d at 642, n. 11 (dissenting opinion).

[30] In practical effect, the Act places corporations astride certain extremely pivotal channels of communication without the ability of the individual employee to contest in any way the censoring corporation's decision. Indeed, by hypothesis, in the event of a denial of permission to solicit, the corporate employee will probably never learn that a political action committee has even tried to contact him. The bitter irony of this is all too apparent. On the one hand, the Act purports to prohibit direct contributions by corporations because of the baleful influence they purportedly have had on the electoral process, while on the other, it entrusts to these very entities the unregulated power to determine what vast numbers of our citizens can read and hear.

[31] Apart from its irrelevance, the medicament prescribed by the majority would prove lethal to the well being of trade associations. Given the scope of trade associations' activities and their necessarily

(footnote continued)

C.

1.

Finally, the majority's *ex cathedra* pronouncement that §(D) is not a prior restraint constitutes a radical break with fundamental First Amendment theory. By prohibiting solicitations of the executive personnel and the stockholders of corporations comprising the membership of trade associations, without the prior written approval of and permission from the corporate members, §(D) has created a system of prior restraint, indistinguishable in its censoring effect on speech and associational freedoms,[32] from the licensing systems consistently invalidated by this Court.

Recognizing that a principle to be vital must be capable of wider application than the mischief which gave it birth, this Court long ago boldly stepped beyond the narrow doc-

(footnote continued)
large operating budgets, (Findings 93; 186), it is obvious that trade associations could not continue to function financially if they were forced to change their membership composition from one that is predominantly corporate (Finding 2) to one that is predominantly individual in nature. Moreover, the major, albeit unarticulated, premise underlying the majority's method for avoiding the burdens of §(D) (*i.e.*, that corporate executives and stockholders have a sufficient commonality of interest that they would be responsive to an association's membership solicitation), is hopelessly inconsistent with its holding that there is no direct relationship or affinity of interest between a trade association and its corporate members' executives and stockholders. It was this supposed absence of commonality of interest which formed the basis for the majority's holding that §(D) did not invidiously discriminate against trade associations. 635 F.2d at 631.

[32] The soliciting and making of political contributions is a form of speech and associational activity lying at the core of the First Amendment. *See Buckley* v. *Valeo*, 424 U.S. 1, 22, 24-25, 65-66 (1976). *Cf., Village of Schaumberg* v. *Citizens For A Better Environment Inc.*, 444 U.S. 620 (1980); *Eastern Railroad Presidents Conference* v. *Noerr Freight, Inc.*, 365 U.S. 127, 138 (1961).

trine that the First Amendment was designed to eliminate only those previous restraints which bore some formal similarity to those imposed by the English system of administrative censorship. *See, e.g., Near* v. *Minnesota,* 283 U.S. 697 (1937); *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936). *Cf., Pittsburg Press Company* v. *Pittsburg Commission on Human Relations,* 413 U.S. 376, 389-90 (1973).

In the years since *Near* and *Grosjean,* this Court has continued its refusal to canalize the doctrine of prior restraint within cramped formalistic boundaries and has reaffirmed the principle that constitutional analysis must have "regard to substance and not to mere matters of form, and . . . the statute must be tested by its operation and effect." *Near* v. *Minnesota, supra,* 283 U.S. at 708. In addition there has been an expansion of the doctrine to embrace freedom to solicit religious contributions, *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); freedom of speech and assembly, *Thomas* v. *Collins,* 323 U.S. 516, 518 (1945),[33] and freedom of association, *Healey* v. *James,* 408 U.S. 169, 183 (1972).

In an undeviating series of cases, this Court has invalidated, as unconstitutional prior restraints, municipal ordinances which required, as a condition to the exercise of First Amendment freedoms, the issuance of a permit by an administrative official, who had virtual discretion and final authority to grant or deny the permit as the spirit moved him.[34] Each of the decisions in these cases stressed

[33] *Cf.* Staub v. City of Baxley, 355 U.S. 313 (1958) (Ordinance prohibiting the solicitation of membership in dues paying organizations without permit from mayor is an unconstitutional prior restraint).

[34] In Nixon v. Administrator of General Services Administration, 433 U.S. 425 (1977), the Court characterized its decisions in the prior restraint cases as "involv[ing] regulations that permitted public officials in their *arbitrary discretion* to impose prior restraints on expressional or *associational* activities." *Id.* at 467, n.27 (Emphasis supplied).

that the First Amendment will not tolerate a regulatory system which makes the exercise of First Amendment freedoms dependent on unprincipled, unreviewable and capricious administrative judgments. It was not merely the sporadic abuse of power by the censor that so troubled the Court, but the pervasive threat inherent in a censorship system which made it incompatible with the First Amendment. *See Southeastern Promotions Ltd.* v. *Conrad, supra,* 420 U.S. at 553; *Thornhill* v. *Alabama,* 310 U.S. 88, 97 (1940).

Thus, municipal ordinances requiring a permit as a precondition to conduct public worship,[35] to use sound amplification devices,[36] to solicit orders or sell books,[37] or to march in a parade[38] were unhesitatingly declared to be unconstitutional prior restraints where they did not contain precisely drawn and narrowly limited criteria governing the issuance of the permit.

2.

Near and its progeny teach that in testing the constitutionality of a statute which is alleged to violate the doctrine of prior restraint "the judicial angle of vision . . . is the operation and effect of the statute in substance."[39] In the instant case, the operative effect of §(D) has been to invest the corporate employers of literally millions of

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[35] Kunz v. New York, 349 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951).

[36] Saia v. New York, 334 U.S. 558 (1948).

[37] Largent v. Texas, 318 U.S. 418, 422 (1943).

[38] Shuttlesworth v. Birmingham, 397 U.S. 147 (1969).

[39] Kingsley Books Inc. v. Brown, 354 U.S. 436, 441 (1957). *See also* Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 552-53 (1975); Organization For A Better Austin v Keefe, 402 U.S. 415, 418-20 (1971); Times Film Corp. v. Chicago, 365 U.S. 43, 48 (1961); NAACP v. Alabama, 357 U.S. 449, 461 (1958); Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943); Near v. Minnesota, *supra,* 283 U.S. at 708, 709, 711-13, 722; ACLU v. Jennings, *supra.*

American citizens with absolute, unreviewable and arbitrary censorial powers.

By empowering a corporation to determine whether a PAC should be given permission to solicit (and thus whether an executive or stockholder can associate with other like-minded individuals through the medium of the PAC), §(D) has created "an effective censorship", *Near* v. *Minnesota*, 283 U.S. at 712, indistinguishable in its operative effect from those licensing systems consistently repudiated by this Court. *See Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 554 (1975); *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 700 (1978).

In short, the prior permission rule of §(D) is a previous restraint in its most pristine and most dangerous form. *See ACLU* v. *Jennings*, *supra*, 366 F.Supp. at 1051-56. However, since prior restraints are not unconstitutional, *per se*, it must be determined whether §(D) satisfies the exceedingly rigid standards against which any mechanism of prior restraint must be tested.

Beginning with *Near* v. *Minnesota*, *supra*, this Court, with unvarying consistency, has made clear that prior restraints are the least tolerable infringement on First Amendment freedoms and that *any* system of restraint is presumptively unconstitutional. In order for the government to meet *its* exacting burden of proving constitutionality, it must demonstrate: (a) that there exist precisely drawn regulations sufficient to obviate the dangers of a censorship system; (b) that the case falls within the exceptional narrow class of cases allowing prior restraint, such as obscenity, obstruction to the conduct of a declared war (or some "kindred" harm), or incitement to violence; and (c) absent imposition of prior restraint, there will surely result direct, immediate and irreparable damage.[40]

[40] *See* Vance v. Universal Amusement Company, 445 U.S. 308, 317 (1980); New York Times v. United States, 403 U.S. 713, 714 (1971); *id.* at 730-31 (White, Stewart, J. J., concurring); *id.* at

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Section (D) fails to satisfy any of these criteria. There are no procedural safeguards designed to obviate the dangers of a censorship system, and it is obvious that §(D) does not fall within the limited class of exceptional cases which has sanctioned prior restraints. More importantly, it cannot be "demonstrated with the degree of certainty [the] cases on prior restraint require" that §(D) would "actually . . . serve its [purportedly] intended purpose" of insuring electoral integrity. *Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 569.

"The overriding concern behind the enactment of statutes such as [FECA] was the problem of corruption of elected representatives through the creation of political debts", *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 777, n.26 (1978), resulting from lavish financial contributions. *Buckley* v. *Valeo,* 424 U.S. 1, 25-26, 55 (1976); *United States* v. *Auto Workers,* 352 U.S. 567, 571, 574, 578-80, 585 (1957). Since a corporate employer has the right to refuse a solicitation request *for any reason,* the prior permission rule of §(D) is not linked to nor does it have the capacity to insure compliance with the Act's contribution limitations.[41] This case thus differs markedly from

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725-26 (Brennan, J., concurring); Nebraska Press Association v. Stuart, *supra,* 427 U.S. at 558, 563, 569; Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 553, 559 (1975). The First Amendment's insistence on the presence of procedural safeguards is not limited to obscenity cases. *See* National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); Procunier v. Martinez, 416 U.S. 396, 417-19 (1974). *See also,* BreadPAC v. FEC, *supra,* 635 F.2d at 637 (dissenting opinion).

[41] In the instant case, corporate employers have refused permission to solicit for such varied reasons as the giving of permission to another trade association; the employer's "fear and general apprehension about being involved in the whole political fund area due to the Watergate scandal" and the belief that granting permission to a PAC would require granting permission to various charitable institutions such as the Red Cross, the Cancer Fund and the United Way. (Findings 111; 120-30).

either *Buckley* v. *Valeo*, or *California Medical Association* v. *FEC*, *supra*, which sustained various limitations on First Amendment freedoms since they were designed and had the capacity to insure adherence to the Act's contribution limitations and thereby to achieve the goal of electoral integrity.

Finally the district court's Findings of Fact belie the majority's unsupported conclusion that §(D) has had only a tenuous effect on First Amendment freedoms. That court found that §(D) has substantially curtailed the solicitation activities of the appellants (Findings 188; 197); has limited their ability "to raise voluntary funds for political purposes; [has] limited their ability to engage in protected political speech and association, and [has] limited the right of persons with similar or related interests to receive from the Plaintiffs communications expressing political ideas, opinions, views and beliefs and thereby associate themselves with the Plaintiffs." (Finding 199). *See also* Findings 58; 94; 100-106; 128; 139; 198; 200.

Under these circumstances, there can be no doubt that §(D) is an unconstitutional prior restraint.

III.

IN ADDITION TO BEING A PRIOR RESTRAINT, SECTION (D) OTHERWISE ABRIDGES THE SPEECH AND ASSOCIATIONAL FREEDOMS OF PLAINTIFFS AND THOSE WITH WHOM THEY SHARE AN AFFINITY OF INTEREST.

It is fundamental that First Amendment protections reach beyond prior restraints, and that statutes which affect speech and associational rights may be unconstitutional even though they do not restrain in advance the exercise of those rights. *See, e.g., Buckley* v. *Valeo*, 424 U.S. 1 (1976). Such statutes, implicating as they do core First Amendment freedoms, are "subject to the most ex-

acting scrutiny." *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976).[42]

While tacitly conceding its applicability, the majority below made no attempt to subject the Act to "the rigorous standard of review established by [this Court's] prior decisions. . . ." *Buckley* v. *Valeo, supra*, 424 U.S. at 29-30. Instead, there is only the *ipse dixit* that §(D) does not violate the First Amendment since any abridgement of associational freedoms is "amply justified" by the "overriding [governmental] interest" in insuring the integrity of federal elections and the voluntariness of contributions. 635 F.2d at 627-29.

In what follows, we shall demonstrate that by sustaining the constitutionality of §(D), the majority ignored the basis upon which *Buckley* sanctioned the restrictions on speech and associational freedoms imposed by the Federal Election Campaign Act's contribution limitations; that §(D) abridges the constitutional right of the appellants to freely solicit contributions from those having an affinity of interest with them; that it will give rise to the very coercion it was purportedly designed to dispel; that it is subversive of the Act's goal of fostering individual responsibility; and that it is unnecessary to the realization of the goals sought to be achieved by the Act.

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[42] In order for a statute implicating rights of political association to withstand a First Amendment challenge, it is not enough to show that legislative action is related to the election process. For as *Buckley* itself teaches, that interest cannot be invoked as a talismanic incantation to support any exercise of power. Instead, it must be demonstrated that: the inhibitions on expressional and associational freedoms are truly *necessary* to further the goal of electoral integrity; that absent the curtailment of First Amendment rights, harm will certainly result; that the means employed are the least restrictive of associational freedoms; and that the benefits gained outweigh the harm to constitutionally protected rights. *See* Buckley v. Valeo, *supra*, 424 U.S. at 16; 24-25; 29-30; and *compare id.* at 64-65. *See*

(footnote continued)

A.

Section (D) Abridges First Amendment Freedoms And Subverts The Underlying Rationale Of Buckley v. Valeo

In sustaining the contribution limitations imposed by the 1974 Amendments to the Federal Election Campaign Act, the Court in *Buckley* v. *Valeo* underscored the absence of any severe impact on the speech and associational rights of potential contributors, candidates and political committees. While the Act prohibited unlimited contributions, it freely permitted the making of contributions within defined limits. Since it was the act of contributing, rather than the size of the contribution which symbolized the contributor's support for and served to affiliate him with the recipient of the contribution and with other contributors, 424 U.S. at 21 and 28, n. 3, the Court concluded that the contribution ceilings imposed only a marginal restriction on speech and associational freedoms.[43] Moreover, the contribution limitations did not affect the ability of candidates and political committees to solicit and aggregate large sums of money. It merely required them to raise funds from a greater number of persons. *Id.* at 21-22; 28, n. 31. *See also,* 635 F.2d at 638 (dissenting opinion).

In every respect, §(D) contravenes the doctrinal assumptions on which *Buckley* was predicated. Unlike the contribution limitations in *Buckley,* which imposed no impediments to the symbolic act of contributing, §(D) di-

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also Wooley v. Maynard, 430 U.S. 705, 716-17 (1977); In Re Primus, 436 U.S. 412, 432-34 (1979); *BreadPAC, supra,* 635 F.2d at 638 (dissenting opinion).

[43] The Court emphasized that while citizens were barred from making large individual contributions, they were free to associate through political action committees, which were allowed to solicit freely. *Id.* at 28, n.31.

rectly, immediately and substantially curtails the solicitation and the making of political contributions. That is, by requiring corporate permission as a pre-condition to solicitation, and by allowing only one trade association to solicit any given employee, the inevitable and intended effect of §(D) is to interdict even the symbolic expression of support evidenced by a contribution.[44]

In addition, by directly and immediately preventing the contribution, §(D) interdicts the very act which serves to affiliate the potential contributor with other like-minded individuals and with the political action committee itself. Consequently, contrary to the situation envisioned by *Buckley*, as a result of §(D), potential contributors are no longer free to associate through political action committees. *See* 635 F.2d at 639 (dissenting opinion). Finally, unlike the situation in *Buckley*, the limitations of §(D) have substantially affected the ability of political committees to solicit and aggregate funds and thus to make political contributions.[45] (*See* Findings 58; 94; 100-106; 128; 139; 197-98; 200).

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[44] There can be no doubt that the restrictions on the solicitation activities of trade association political action committees were imposed with full awareness of the pervasive effect they would have on associational and expressive freedoms. In fact, the FEC has explicitly acknowledged that the underlying purpose of these restrictions "is to control [trade association PACs'] access to the same person who might otherwise be solicited and contribute to several political committees connected to separate trade associations. By requiring advance solicitation approval, and limiting approval by corporate members of a trade association to one trade association per year, the fundraising potential of the trade association committee is limited." *See* Advisory Opinion 1978-17, CCH Federal Election Campaign Financing Guide, ¶5307.

[45] For example, in 1976 and 1978, BreadPAC lacked funds to contribute to eligible candidates whom it desired to support and who made requests to it for contributions. (Finding 145; Plaintiffs' Exhibit 1-15).

B.

Trade Associations Have The Constitutional Right To Freely Solicit Contributions From Those Having An Affinity of Interest With Them

Count I of the Complaint charged that the restrictions of §(D) violated the First Amendment in that they deprived individuals having an affinity of interest from being able to freely associate together. (*See* Count I, ¶31(d), J.A. at 24-25).[46] Judges Pell, Bauer and Chief Judge Fairchild agreed that by curbing the appellants' ability to freely solicit "those with whom they share an affinity of interest", §(D) impermissibly burdened the First Amendment rights of the appellants and of potential solicitees. *See* 635 F.2d at 637.

The majority's rejoinder was in two parts. The first consisted of the *non-sequitur* that while the appellants could not freely solicit they could freely accept contributions from any individual. *See* 635 F.2d at 628. The majority never paused to explain how contributions could be made when the potential contributor was unaware of the existence or purpose of the entity which was to receive the contribution.

The second and more important basis for the majority's rejection appears to be predicated upon the following series of propositions: (1) the long standing prohibition of corporate and union "expenditures" in connection with federal elections has always included the use of corporate and union funds to pay for the administrative costs of a PAC's solicitation activities; (2) such a prohibition is constitutional; (3) by allowing incorporated trade associations to use general funds to defer the administrative ex-

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[46] ¶31(c) charged that the Act violated the First Amendment by impermissibly restricting the class of permissible solicitees to the stockholders and the executive and administrative personnel of corporations comprising the membership of trade associations.

penses of solicitation, §441b(b)(2)(C) accords the association a statutory benefit to which it would otherwise not be constitutionally entitled;[47] (4) and finally—although never expressly articulated—since Congress could prohibit that which in its largesse it has now allowed, it can attach any conditions it deems appropriate. *See* 635 F.2d at 627-28. *See also id.* at 630.

None of the authorities cited by the majority, *id.* at 627, support its conclusion. While those cases sustained Congressional power to impose prohibitions on unrestricted corporate expenditures and contributions, none even remotely considered the question of whether the use of corporate or union treasury funds to defray the administrative expenses of a PAC would be an impermissible "expenditure." Each did, however, recognize that the First Amendment allows corporations and unions to establish PACs and to solicit voluntary contributions to be used for political purposes.

This recognition is, of course, consistent with the Supreme Court's exegesis of the Federal Corrupt Practices Act. In *Pipefitters* v. *United States*, 407 U.S. 385 (1972), the Court reviewed the history and development of §205 of the Federal Election Campaign Act of 1971 which, "with one exception"—which we shall discuss shortly—"merely codifie[d] prior law. . . ." *Id.* at 399 In *Pipefitters*, the Court concluded that despite the apparent breadth of its language, the Federal Corrupt Practices Act was never intended to prevent unions and corporations from making "through the medium of a political fund organized by it, contributions or expenditures in connection with federal elections so long as the monies expended are in some sense

[47] The majority's assumption in this regard is erroneous, for the Hanson Amendment merely took cognizance of the fact that corporations and unions had long used general funds to administer PACs. *See* California Medical Association v. FEC, 641 F.2d 619, 629-30 (9th Cir. 1980) (*En Banc*), *aff'd* ____ U.S. ____ (1981).

volunteered by those asked to contribute." *Id.* at 401. *See also id.* at 402-403.

The possible exception referred to in *Pipefitteers* was whether the explicit statutory authorization in the Federal Election Campaign Act to use union or corporate funds to administer the costs of a PAC's solicitation activities was a modification or a codification of prior law. However, the Court in *Pipefitters* explicitly declined to answer this question. *See* 407 U.S. at 428-432. While *Pipefitters* is not dispositive, guidance is not wholly wanting. Indeed, the Court's earlier decisions in *United States* v. *CIO*, 335 U.S. 106 (1948) and *United States* v. *Auto Workers*, 352 U.S. 567 (1957) are especially illuminating.

From the atmosphere and emanations of *CIO* and *Auto Workers*, there emerges with unmistakable clarity a recognition that corporations and unions do indeed have the First Amendment right to communicate not only with their members and stockholders, but also with their "customers" and people "affiliated with" them. *See* 335 U.S. at 121; 352 U.S. at 592. *See also First National Bank* v. *Bellotti*, 435 U.S. 765, 808 (1978) (White, J., dissenting). But "*[t]his reasoning, of course, applies as well to solicitations for contributions to voluntary political funds.*" *Pipefitters* v. *United States*, 407 U.S. 385, 431, n.42 (1972) (Emphasis supplied). That is, the very same justifications that allow corporations and unions to use their funds to commmunicate on political matters with those having some appropriately close relationship, justify and constitutionally mandate that corporations and labor unions be allowed to use their own funds to defer the costs of PAC solicitation directed to the same class. Such expenditures are not directed to "the public at large" and, thus, do not contravene the purposes underlying the Corrupt Practices Act and its successor, the Federal Election Campaign Act.

The majority met the force of these arguments with the facile, *a priori* conclusion that only unions and their

members and corporations and their executives and stockholders have a commonality or affinity of interest. *See* 635 F.2d at 631. However, as the preceding discussion demonstrates, the majority's conclusions are contrary to the decisions of this Court, and, as Judge Pell so cogently demonstrated, they are analytically indefensible. (*See* 635 F.2d at 639; 642).

Compelling evidence of the validity of the minority's position is to be found in a 1975 opinion letter from Mr. Richard Thornburg, the then Assistant Attorney General of the Criminal Division of the Department of Justice—the agency which, for more than 60 years, has been responsible for prosecutions under the Tillman Act, the Federal Corrupt Practices Act and the Federal Election Campaign Act.

That letter was in response to an FEC request for the Department's legal opinion as to whether 18 U.S.C. §610 could constitutionally prohibit the use of corporate and union funds in connection with PAC solicitation if directed to anyone other than shareholders and union members. In that opinion, "which is entitled . . . to great weight", *Pipefitters* v. *United States,* 407 U.S. 385, 409 (1972), the Department of Justice stated that the prohibition of corporate "contributions and expenditures" could not, consistent with the First Amendment, be so narrowly limited. Rather a corporate (or union) PAC has the constitutional right to use its own funds to defer the costs of solicitation activities directed toward any person or group having an *affinity of interest* with the corporation or union. *See* Jurisdictional Statement, App. D at 53.

Since there is an affinity or commonality of interest between the appellants and the stockholders and executive and administrative personnel of their member corporations, the First Amendment will not tolerate the unnecessary and overbroad restrictions imposed on trade association solicitation by §(D).

C.
Section (D) Will Heighten Rather Than Reduce Coercion

The majority's second justification for the massive dislocation of First Amendment freedoms wrought by §(D) was the purported necessity of "protecting individuals from economic coercion." 635 F.2d at 627. Careful analysis demonstrates that this unsupported contention cannot withstand scrutiny.

Underlying certain subparagraphs of §441b was Congress' desire to protect employees from the undercurrent of pressure which the Congress perceived to be latent in *direct solicitation* by their *own* corporate employers and union superiors. Indeed, the Conference Report accompanying the 1976 Amendments reveals that Congress perceived in such *direct* solicitation the need for imposing appropriate safeguards to insure against reprisals directed toward employees who do not contribute as much as the solicitor thinks appropriate.[48]

Congressional concern with direct corporate (and union) solicitation of its *own* employees (and members) is readily understandable, for the federal courts and the Congress

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[48] To insure that contributions would be freely given, the Congress required that soliciting corporations inform their *own* executive and administrative employees of the political nature of the solicitation and of their right to refuse to contribute without reprisal. *See* 2 U.S.C. §441b(b)(3)(B) and (C); 122 Cong. Rec 12,199 (daily ed. May 3, 1976) (remarks of Congressman Hayes) (H. R. Rep. on S-3065, Federal Election Campaign Act Amendments of 1976). In addition, to assure the anonymity of those who do not wish to respond or those who wish to respond with a small contribution, a corporation's bi-annual solicitation of *its* rank and file employees can be made only by mail addressed to employees at their residence and must be so designed that the soliciting corporation cannot determine who makes a contribution of $50.00 or less and who does not make any contribution. 2 U.S.C. §441b(b)(4)(B).

have long perceived the immediate and direct economic dependence of the employee on his corporate employer or union superiors. And they have been sensitive to the possibility that such direct economic dependence could have a subtle impact on various decisions which the employee may be called upon to make. *See Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960); *NLRB* v. *Gissel Packing Company*, 395 U.S. 575, 617 (1969). *Compare United States* v. *Will*, ... U.S. ..... (1980), 66 L.Ed.2d 392, 408.

However, economic dependency is conspicuously absent in the context of trade association solicitation of its member corporations' *stockholders*. It is also absent in the context of solicitation of its members' administrative and executive employees. *See* 635 F.2d at 639 (dissenting opinion). One searches the legislative history of the Act in vain for even a whisper of Congressional concern that trade association solicitation is somehow coercive. This absence of concern stands in stark contrast to Congress' preoccupation with direct corporate and union solicitation of their *own* employees and members.

By requiring corporate consent as a precondition to solicitation, § (D) has unnecessarily interposed the employer between the trade association and the prospective contributor and has thus "heigten[ed] rather than diminish[ed]" any coercive pressures which might exist. For "[e]xplicit corporate consent to trade association solicitations subtly, yet directly, would appear to suggest to employees that the employer favors a contribution." *Id.*[49] Compare *NLRB* v. *Virginia Power Company*, 314 U.S. 469, 477 (1941); *NLRB* v. *Gissel Packing Company*, *supra* 395 U.S. at 617. *See also*, Plaintiffs' Exhibit 1-31. In short, § (D)

[49] In one sense, §(D) precludes any real freedom of choice, for if consent is unilaterally denied by the employer, the employee will have no choice to make.

will result in the very evil it purportedly was designed to eradicate.

However, even if some minimal degree of coercion were found to inhere in trade association solicitation, § (D) would still be unconstitutional. For the method it has chosen to combat the supposed evil violates the principle that achievement of valid ends cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. *See Wooley* v. *Maynard,* 430 U.S. 705, 716-17 (1977); 635 F.2d at 638 (dissenting opinion).

To satisfy the least drastic alternative test, § (D) would be required to mandate that denial of permission to solicit be predicated upon the prevention of coercion. As presently, written, however, § (D) allows a corporation to deny a trade association's request to solicit for *any reason. See supra,* note 41. An obviously less drastic and intrusive means of insuring freedom of choice is the establishment of a system of solicitation which either reminds the prospective contributor that he need not contribute, or that insures the anonymity of the contributor, or both. 635 F.2d at 638. As noted earlier, the efficacy of such alternatives has been recognized by the Congress. *Compare Miranda* v. *Arizona,* 384 U.S. 436 (1966) (system of warnings adequate to dispel coercive effects of custodial interrogation).

Stripped of its pretensions, the majority's thesis is nothing more than paternalism in its worst form. For it assumes, contrary to the most basic tenents of the First Amendment, that our people are incapable of making volitional choices and that they need the paralyzing power of the corporate censor to protect them from a request for a political contribution. But "[t]he First Amendment rejects the 'highly paternalistic' approach of statutes like [§ (D)] which restrict what the people may hear."

First National Bank of Boston v. *Bellotti*, 435 U.S. 765, 791, n.31 (1976).

"In the free society ordained by our Constitution, it is not the government but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control" over the channels of political communication. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 56. *Cf.*, *Marsh* v. *Alabama*, 326 U.S. 501, 508 (1946). If we are false to this faith, we as a Nation will surely pass to that oblivion which will be our proper receptacle.

D.

Section (D) Unnecessarily Burdens First Amendment Freedoms

The Federal Election Campaign Act and its various Amendments in 1974 and 1976, created an elaborate framework for the regulation of all phases of the election process. The Act has imposed pervasive disclosure and reportin requirements (§434), created substantial civil and criminal sanctions for violations of its provisions (§§ 437g, 441j; *see also* §§437d, 438(a)(9)), and has imposed specific limitations on the amount of money that can be contributed by political committees or individuals (§§441a, and b).

In addition, Congress, in the 1976 Amendments, enacted rigid and explicit "anti-proliferation" provisions "to prevent corporations, labor organizations, or other groups of persons from evading the [Act's] contribution limitations . . . ." (Conference Report No. 94-1057, accompanying S-3065, 4/28/76, at 58). The "anti-proliferation" provisions provide that, for purposes of the contribution limitations, all contributions made by political committees, established, financed, maintained or controlled by any corporation or union shall be considered to have been made by a single political committee. 2 U.S.C. §441a(a)(5). The Act also prohibits contributions through nominees (§441f) and contributions in currency (§441g).

In light of this elaborate mechanism, it is idle to suggest that §(D) is necessary or has the capacity to achieve the goal of electoral integrity by insuring compliance with the Act's contribution limitations. Moreover, such a contention cannot be entertained in light of *Buckley*. There this Court, in rejecting an almost identical argument, held that the contribution limitations, in conjunction with the disclosure requirements and the Act's criminal penalties, were sufficient safeguards against evasion of the Act's contribution limitations. 424 U.S. at 44-47; 55-56; and *Id.* at 236 (Burger, C.J., concurring and dissenting). If, prior to the enactment of the antiproliferation provisions, the Act was adequate to prevent evasion of the contribution limitations, their addition surely makes unecessary the various restraints imposed by §(D). *See* 635 F.2d at 640 (dissenting opinion).

E.
Invalidating §(D) Will Achieve The Act's Goal of Preserving Confidence in Government

Perhaps the basic postulate underlying the First Amendment is that our people have the capacity to make enlightened judgments about matters affecting their political, social and economic destiny and that of the Nation. It may be that these presuppositions are false; however, as Learned Hand once observed, upon them we have wagered our all.

The majority's validation of §(D) makes a mockery of the precepts underlying the First Amendment and reduces to a dead echo the boast that we are a free people. Not only is it contrary to the spirit of the First Amendment, but it is fundamentally at odds with the primal goal of the Federal Election Campaign Act. In *United States* v. *Auto Workers*, 352 U.S. 567 (1957), the Court took care to point out that the purpose of the Federal Corrupt Practices Act was "not merely to prevent the subversion of the integrity of the electoral process. Its

underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." Id. at 575, 590. This same theme was echoed in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), which reaffirmed the *Auto-worker's* formulation and, in addition, expressly held that "equally important" was the goal of "[p]reservation of the individual citizen's confidence in government. . . ." *Id.* at 788-789.

Achievement of these goals surely is not furthered by §(D). For an enlightened citizenry can only exist where the information they receive is uncensored. *Marsh* v. *Alabama*, 326 U.S. 501, 508 (1946). Nor can it be suggested that §(D) will help to preserve the individual citizen's confidence in government. It does not take a master of either political science or psychology to recognize that confidence in government cannot exist where the government itself has made the fundamental right to receive political information, to make political contributions, and to associate with those with whom there is an affinity of political interest dependent upon the unprincipled whim of one's corporate employer.

Counterpoised against the palpable harm to First Amendment interests which will result if §(D) is to be sustained, is the absence, if it is invalidated, of any injury either to the public or to the Federal Election Campaign Act itself. Clearly, the various gears and cogs which truly make the statutory machinery effective will not be altered by a declaration of unconstitutionality. There can be no persuasive claim that the restrictions of §(D) are integral to the overall functioning of the Act, or that their cessation will undermine its efficiency. On the contrary, as we have shown above, the restrictions of §(D) not only disserve the First Amendment but are antithetical to the ends sought to be achieved by the Federal Election Campaign Act.

In conclusion, when §(D) is viewed against the backdrop of the entire Federal Election Campaign Act, and when it is realized what a debilitating effect it has on the First Amendment rights of the appellants and countless of our citizens, it can scarcely be suggested, as the FEC did in the court of appeals, that the Congress has struck "an [sic] delicate balance between those who comprise the corporation and the rights of the public." (Gov. Br. at 47).

IV.

SECTION (D) INVIDIOUSLY DISCRIMINATES AGAINST TRADE ASSOCIATIONS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Although the district court found that the restrictions of § (D) apply exclusively to solicitations undertaken by trade associations, that no comparable restraints are imposed on solicitations by independent, corporate and union PACs, and that these restrictions had substantially and adversely affected plaintiffs' solicitation activities, the majority held that § (D) did not invidiously discriminate against trade association. In support of this view, the majority argued that not only do incorporated trade associations have the same solicitation rights, *vis-a-vis* their own executives and stockholders as are enjoyed by any other corporation, but, in addition, are accorded by § (D) "an additional group of potential solicitees not available to other corporate entities."[50] 635 F.2d at 630.

In *Buckley* this Court held that even when a statute facially appears to be evenhanded, "[t]he appearance of fairness, however, may not reflect political reality." 424 U.S. at 31, n.33. As the minority demonstrated, this case presents precisely such a situation, for "the statute as a

[50] (*i.e.* executive and administrative personnel and the stockholders of member corporations).

whole", *California Medical Ass'n.* v. *FEC*, *supra*, 49 L.W. at 4847, imposes far more restrictions on trade association PACs than on any other kind of political committee.

A.

Incorporated Trade Associations Do Not Enjoy the Same Solicitation Rights As Other Corporate Entities

Unlike the situation that obtains with corporations organized for profit, most trade associations are not-for-profit corporations, having no stockholders, and exceedingly small executive and administrative staffs. Thus, the typical for-profit corporation, which is outside the scope of § (D), possesses a substantially greater solicitation pool than does an incorporated trade association. It is thus fanciful to suggest that trade associations are not treated differently than other corporate entities merely because the Act, facially, accords both equal solicitation rights regarding their *own* executives and stockholders. *See* 635 F.2d at 641-642 (dissenting opinion).

Nor is the practical inequality in treatment attenuated because § 441b(4)(C) facially accords trade associations the "right" to solicit their *individual* members. Since the membership of trade associations is comprised almost exclusively of corporations (which cannot make contrbutions (§ 441b) and thus cannot be solicited), the "right" to solicit individual members is illusory. And since most trade associations have few rank and file employees, the "right" to solicit their *own* rank and file is rendered meaningless. *Id.*[51]

The untenability of the majority's arguments becomes even more apparent when applied to a federated trade as-

[51] The majority's conclusion about the supposed equality between trade associations, corporations, membership organizations, and labor unions calls to mind Anatole France's insight in Le Lys Rouge; "The law in its majesty *equally* forbids the rich as well as the poor to sleep under bridges, to be in the streets, and to steal bread." (Emphasis supplied).

sociation like plaintiff National Lumber and Building Materials Dealers Association ("NLBMDA") and its political action committee, Lumber Dealers Political Action Committee ("LuDPAC"). NLBMDA is an incorporated trade association to which belong 27 regional incorporated trade associations, which in turn have some 15,000 retail lumber and building materials dealers as members. Simply stated, it is an association of associations. (Findings 24-25).

If NLBMDA's "members" are deemed to be the 27 regional associations, it is obvious that NLBMDA and other federated trade associations not only do not "have broad solicitation rights," 635 F.2d at 630, they have virtually no solicitation rights. Like other incorporated trade associations, federated associations have no stockholders, exceedingly small executive and administrative staffs, and few, if any, rank and file employees. Thus, in practical application, their solicitation rights are not congruent with those of for-profit corporations.

More importantly, the supposed benefit accorded by § (D) to trade associations in the form of an "additional group of potential solicitees," 635 F.2d at 630, is meaningless when considered in the context of federated associations. If NLBMDA's "members" are the 27 regional trade associations, the "additional group of potential solicitees" will not consist of any stockholders since incorporated trade associations are generally not-for-profit and have no stockholders. This leaves only the approximately 40 executive and administrative personnel of the 27 regional associations which belong to NLBMDA. (Finding 61).

If it be true that "[r]ealities must dominate judgment," *Appalachian Coal Co.* v. *United States*, 288 U.S. 344, 360 (1933), the minority properly concluded that the differences in structure between trade associations and other entities "should give rise to broadened, not restricted solicitation rights for trade associations because the statutory

avenues of solicitation available to corporations and membership organizations prove fruitless when applied to incorporated associations." 635 F.2d at 641 (dissenting opinion).

B.
Trade Associations Do Not Have the Same Solicitation Rights As Unions

The invidiously discriminatory nature of § (D) is dramatically illustrated by a comparison of the solicitation rights accorded trade associations with those accorded unions having a federated structure. Federated unions, such as the AFL-CIO, are composed of a number of International Unions, which in turn, are composed of numerous Locals. While the organizational structure of federated unions is identical to that of federated trade associations, the former are accorded infinitely greater solicitation rights.

For example, the AFL-CIO's PAC can solicit all individual members of all the Locals comprising all of the Internationals with unlimited frequency and without prior permission from the Internationals or the Locals.[52] These solicitations can be independently conducted regardless of whether the PACs of the International Unions have solicited the individual members of the Locals. *See* 2 C.F.R. §114.5(g). *See also* 635 F.2d at 641. Finally, the PACs of the various Internationals are not deemed "affiliated" with the AFL-CIO's PAC for purposes of the contribution limitations of the Act. Thus, contributions from the AFL-CIO's PAC are not aggregated with contributions of the PACs of the International Unions. *See* 2 C.F.R. §110.3(a)(1)(ii).

The treatment accorded federated trade associations by the Act differs drastically. The national association cannot freely solicit the executive and administrative per-

[52] For solicitations purposes, the members of the various Locals are also members of the AFL-CIO. *See* 2 C.F.R. §114.1(e).

sonnel of the corporations comprising the membership of the regional associations which belong to the national association. It must either conduct a joint solicitation with its regional "member" association or have delegated to it those "members" solicitation rights. 635 F.2d at 641. Regardless of the alternative chosen by the national association, there can be no solicitation without the prior written permission of the regional associations' corporate members and without compliance with the other restrictions of § (D). Perhaps the most glaring disparity in treatment is that, unlike the situation which obtains with federated unions, a federated trade association's regional "member"-associations are deemed to be affiliated with the national association for purposes of the Act's contribution limitations. *See* 2 U.S.C. §441(a)(5); 2 C.F.R. 110.3 (a)(1)(ii)(D).

The avowed purpose of the disparate treatment of trade association PACs is to limit their fundraising potential. *See supra* at 32, n.44. Such a purpose cannot survive constitutional scrutiny, for the First Amendment condemns attempts to "[e]qualize the relative ability of individuals and groups to influence the outcome of elections. . . ." The concept "that government may restrict the speech [or, *a fortiori*, the right of association] of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 48-49.

The exacting analysis required by the Due Process Clause of the Fifth Amendment leads to the same conclusion as the First Amendment analysis: there is absent any compelling interest warranting the invidiousness of § (D), and the mechanism chosen by that section to achieve its goals is the antithesis of the least restrictive means, closely tailored to avoid unnecessary abridgement of First

Amendment freedoms.[53] Consequently, § (D) is violative of the Due Process Clause.

V.

SECTION (D) IS VAGUE AND OVERBROAD

For more than a century there has been virtual unanimity of judicial opinion that where the word "solicitation" is used in a statute without being defined, it will be accorded its commonly understood dictionary definition: to importune, entreat, implore, ask, attempt to obtain—in short, to intentionally and specifically request a particular thing. *See e.g., Laurel* v. *Superior Court for Los Angeles County*, 255 Cal. App.2d 292, 63 Cal. Rptr. 114, 118 (1976).

The drafters of the Act, however, have disavowed the dictionary definition in favor of a broad sweeping concept which includes "anything which fairly could be deemed a request for a contribution." (*See* FEC Advisory Opinion 1978-83, CCH Federal Election Campaign Financing Guide, ¶ 5382). A statute of such protean contours is incompatible with the First Amendment, for it "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn from his intention and meaning." This the Constitution will not allow. *Thomas* v. *Collins*, 323 U.S. 516, 535 (1944). *See also Buckley* v. *Valeo, supra*, 424 U.S. at 42-43.

While implicitly acknowledging that this was indeed the definition intended by the Congress, 635 F.2d at 632, the court of appeals found the Act neither vague nor overbroad.[54] The court however made no attempt to demon-

[53] The criteria employed in Fifth Amendment Due Process [Equal Protection] analysis are the same as those employed in First Amendment cases. *See* Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Police Department v. Mosley, 408 U.S. 92, 95 (1972).

[54] While joining in this conclusion, Chief Judge Fairchild and Judges Pell and Bauer held that the FEC had construed the term so broadly that there was a chilling effect on protected speech. (635 F.2d at 636).

strate that such a sweeping definition was constitutionally permissible. Instead, it merely adverted to cases sustaining, against vagueness and overbreadth attacks, statutes which have used the term solicitation without explicit definition. 635 F.2d at 631. Since, however, in those cases solicitation was intended to have its customary dictionary definition, they do not support the court's ultimate conclusion.

The court also ignored the recent holding of the District of Columbia Circuit that, as used in the Act, the term "solicitation" is "inherently vague", and "a crucial ambiguity inheres in the word 'solicit'. . . ." *See Martin Tractor* v. *FEC*, 627 F.2d 375 (D.C. Cir.), *cert. denied* 100 S.Ct. 360 (1980). An examination of the FEC's advisory opinions confirms the validity of the D.C. Circuit's conclusion and demonstrates that the limitless sweep of the definition has made it impossible to ascertain what speech will constitute a solicitation. Additionally, the statutory vagueness and overbreadth have allowed the FEC to assume the role of a super-governmental censor, regulating arbitrarily the political speech and association of citizens in every part of the Nation.

For example, in Advisory Opinion 1979-13, the FEC ruled that an article proposed for inclusion in a corporate PAC's regular newsletter would constitute a solicitation "since it describes [the PAC's] activities and encourages participation in [the PAC] by commending the enthusiasm of employees whose participation in [the PAC] has indicated awareness of the connection between their welfare and government policies toward business." CCH Federal Election Campaign Financing Guide, ¶5403. Thus, the article could not be circulated to anyone (including retired executives) who was not a corporate stockholder or executive and who had not been approved for solicitation by the company as required by § (D). Not only is AO 1979-13 predicated upon an atavistic and discredited

conception of the First Amendment,[55] but it demonstrates the imposibility of determining in advance of action, what speech will be deemed a "solicitation."

The vagueness and overbreadth of § (D) have allowed the FEC to prohibit, as a "solicitation," an announcement about the mere existence of a fundraising event (AO 1976-27 and 1976-96, CCH Federal Election Campaign Financing Guide ¶¶5213, 5227), and to require that conspicuous signs and other promotional activity to be used at a PAC booth at a convention be displayed and conducted so that only properly authorized people are exposed. (AO 1978-83; AO 1978-17—CCH, *supra*, at ¶¶ 5382, 5307).

The fact that "it was permissible for the [FEC] to come out differently in these and other cases" 635 F.2d at 632, scarcely supports the conclusion that § (D) is neither vague nor overbroad. On the contrary, it is precisely because the statute gives the FEC such arbitrary latitude in the sensitive area of First Amendment freedoms that it must be declared unconstitutional. *See Hynes* v. *Mayor Of Oradell*, 425 U.S. 610 (1976); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[55] Since Mr. Justice Holmes' classic dissent in Gitlow v. New York, 268 U.S. 652, 672 (1925), the expression of ideas and opinion is constitutionally protected even if enthusiastically advanced. *See* Buckley v. Valeo, *supra*, 424 U.S. at 43; FEC v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315 (D.D.C. 1979).

APPENDIX A

EFFECTS OF THE ACT ON THE SOLICITATION ACTIVITIES OF BREADPAC

	1975	1976	1977	1978
Association Membership	298	321	323	363
Percentage of ABA Members Expressly Refusing Permission to Solicit		16%	11%	6%
Percentage of ABA Members Failing to Respond to Request for Permission to Solicit[1]		30%	39%	59%
Total Percentage of Member Corporations Unavailable for Solicitation by BreadPAC		46%	50%	65%
Employees of Member Corporations Solicited	1100	1300/462[2]	577	421
Other Individuals Solicited	150	604/0	0	0
Individuals Contributing	311	310	195	205
Total Amount of Contributions Received by BreadPAC	$40,190	$38,712	$28,000	$29,550

[1] A failure to respond is equivalent to and must be treated the same as a denial of permission to solicit.

[2] Pre May 11, 1976/Post May 11, 1976 figures.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

BREAD POLITICAL ACTION COMMITTEE, ET AL.,
APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, ET AL., APPELLEES.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

(1) Whether appellants, who are not among the categories enumerated by Congress as eligible plaintiffs in 2 U.S.C. § 437h, may nonetheless invoke the jurisdiction of this Court pursuant to that provision.

(2) Whether this Court should affirm the *en banc* decision of the court of appeals that 2 U.S.C. § 441b (b)(4)(D) is consistent with the first and fifth amendments to the Constitution of the United States.*

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* The other parties to this proceeding include: National Lumber and Building Material Dealers Association ("NLBMDA"), Lumber Dealers Political Action Committee ("LuDPAC"), National Restaurant Association ("NRA") and Restauranteurs Political Action Committee ("RPAC") as appellants. Named as other appellees are: Francis R. Valeo, Secretary of the United States Senate and Ex-Officio member of the Federal Election Commission, Edward Henshaw, Clerk of the U.S. House of Representatives and Ex-Officio member of the Commission and Vernon W. Thomson, Thomas E. Harris, Neil Staebler, William Springer, Robert O. Tiernan and Joan D. Aikens, as members of the Commission, and Hon. Griffin Bell, as Attorney General. By court order dated June 10, 1977, the Attorney General was dismissed as a defendant. Messrs. Staebler and Springer are no longer Commission members; Messrs. John W. McGarry and Frank P. Reiche are currently members of the Commission. William F. Hildenbrand is currently the Secretary of the Senate and Ex-Officio member of the Commission, rather than Francis R. Valeo.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1481

BREAD POLITICAL ACTION COMMITTEE, ET AL., APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEES

OPINIONS BELOW

The January 12, 1979, opinion of a panel of the United States Court of Appeals for the Seventh Circuit, overruling the district court's decision not to certify under § 437h and remanding the case for fact-finding and certification, is published at 591 F.2d 29 (7th Cir. 1979). The December 19, 1979, Order of the United States District Court for the Northern District of Illinois certifying constitutional questions to the court of appeals is not published. The December 5, 1980, decision of the United States Court of Appeals for the Seventh Circuit is reported at 635

F.2d 621 (7th Cir. 1980) (en banc) and appears at Appendix A of appellants' Jurisdictional Statement ("J.S. App.") at 1-45.

JURISDICTION

Appellants rely upon 2 U.S.C. § 437h as the basis for this Court's jurisdiction.

STATUTES INVOLVED

This case concerns several provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.*[1] Specifically, 2 U.S.C. § 437h is at issue with regard to the jurisdiction of this Court, and appellants challenge 2 U.S.C. § 441b(b)(4)(D) on constitutional grounds. Sections 437h and 441b are set forth in the Appendix to the Commission's Motion to Dismiss or in the Alternative to Affirm, filed April 1, 1981.

STATEMENT OF THE CASE

A. Historical Development of Section 441b

This case challenges the constitutionality of an exception to the § 441b prohibition on the use of corporate and labor organization funds in connection with federal elections. Concern over aggregations of corporate wealth being used to influence federal

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[1] The Federal Election Campaign Act of 1971 (the "Act" or "FECA"), Pub. L. No. 92-255, 86 Stat. 3 (1972) was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974), by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976), by the Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655 (1977), and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). The relevant provisions of the Act are codified in Title 2, United States Code.

elections led to congressional passage in 1907 of the first concrete congressional effort to regulate the impact of such aggregated wealth, the Tillman Act, Chapter 420, 34 Stat. 864 (1907), which was directed only at corporations and prohibited them from making "money contributions" in connection with federal elections. This reflected the congressional judgment that the only way to prevent corruption and abuse arising out of corporations using their aggregated wealth to influence elections was to prohibit completely corporate contributions in connection with federal elections.

In the ensuing years, Congress concluded that the reach of the statute was insufficient to prevent these evils from undermining faith in the electoral process. Thus, in 1925, the Tillman Act was expanded to include all contributions and was incorporated into the Federal Corrupt Practices Act, 43 Stat. 1070. The prohibitions were extended to labor organizations, first temporarily by the War Labor Disputes Act, 57 Stat. 163, in 1943, and then permanently by the Labor Management Relations Act (Taft-Hartley) of 1947, 61 Stat. 159, which also broadened the prohibition to include expenditures as well as contributions. In 1948, the prohibition was re-enacted, without substantive change, as 18 U.S.C. § 610.[2]

The next substantial changes to the statutory provisions came in 1971 when Congress enacted a number of explicit exceptions to the broadly phrased

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[2] The evolution of the predecessor of § 441b, 18 U.S.C. § 610, through the 1971 legislation, is fully set forth in *Pipefitters* v. *United States*, 407 U.S. 385 (1972) (*"Pipefitters"*); *United States* v. *International Union United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)*, 352 U.S. 567, 571 (1957) (*"U.S.* v. *UAW"*), and *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 112-113 (1948) (*"U.S.* v. *CIO"*).

prohibitions, to explicate the areas in which the expenditure of money in connection with federal elections by corporations was protected.[3] Described by their sponsor as "mere codifications," the 1971 amendments were "intended to strike a balance between the objectives served by banning the use of corporate and union funds in federal elections and permitting wholly unrestricted association between the regulated groups and those individuals in a direct relationship with them". J.S. App. at 11, *citing* 117 Cong. Rec. 43,379-381 (1971). They were drafted and adopted as three express exceptions to the overall prohibition, which allowed corporations and labor organizations to use general treasury funds for the following purposes: to communicate with their stockholders or members and their families on any subject, § 441b (b) (2) (A); to engage in non-partisan registration and get-out-the-vote activities aimed at their stockholders or members and their families, § 441b(b) (2) (B); and to establish, administer, and solicit voluntary contributions to a separate segregated fund for political purposes, § 441b(b) (2) (C).[4]

Following this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (*"Buckley"*), Congress reexamined this entire area. It reenacted the broad prohibition on corporate and union expenditures in connection with federal elections, but made it part of FECA, Title 2 of the U.S. Code, rather than the criminal code, Title 18. In addition, Congress explicitly identified those groups of individuals who could be solicited for con-

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[3] *See* 117 Cong. Rec. 43,379-81 (1971) (remarks of Mr. Hansen); 117 Cong. Rec. 43,383-85 (1971) (remarks of Mr. Thompson).

[4] These changes were enacted while this Court was considering *Pipefitters, supra.*

tributions to a separate segregated fund with corporate money. In section 441b(b)(2)(C), Congress added a corporation's own executive and administrative personnel and their families to the list of permissible solicitees. *See* H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 7 (1976). Congress also provided, in § 441b (b)(4)(B), that under certain circumstances a corporation could solicit contributions twice yearly from any of its employees, and a labor organization representing corporate employees could solicit twice yearly from corporate stockholders, executive or administrative employees and their families.

Recognizing that some types of corporations are organizations which have members rather than stockholders, Congress also enacted § 441b(b)(4)(C) in 1976, which permitted "a membership organization, cooperative, or corporation without capital stock" to use corporate funds to solicit contributions to its separate segregated fund from its members.[5] And, recognizing the unique situation of trade associations, Congress in § 441b(b)(4)(D), the provision at issue in this case, added an additional category of individuals which an incorporated trade association could use its corporate money to solicit for contributions to its separate segregated fund, which it defined as:

> the stockholders and executive or administrative personnel of the member corporations of such trade associations and the families of such stockholders or personnel to the extent that such

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[5] *See* 122 Cong. Rec. S3811, S3812 (daily ed. March 18, 1976) (remarks of Sen. Allen), *Legislative History of Federal Election Campaign Act Amendments of 1976* ("*1976 Legis. Hist.*") at 463, 464; 122 Cong. Rec. S6477-78 (daily ed. May 4, 1976), *1976 Legis. Hist.* at 1107-08. *See also* H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 6-7 (1976), *1976 Legis. Hist.* at 806-807.

solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

B. Procedural History

On March 22, 1977, appellants filed a complaint in the United States District Court for the Northern District of Illinois seeking a permanent injunction against enforcement of 2 U.S.C. § 441b(b)(4)(D) or, alternatively, certification of the constitutionality of the subsection to the court of appeals under 2 U.S.C. § 437h. Joint Appendix ("J.A.") at 15. The district court denied the request for an injunction on the ground that the appellants had not demonstrated a probability of success on the merits and denied the motion for certification because the named plaintiffs were not among those enumerated as eligible to invoke the extraordinary procedures of 2 U.S.C. § 437h. Appellants' request for an interlocutory appeal on the question of whether FECA's unique jurisdictional provision is available for use by any person, regardless of Congress's limited enumeration, was granted by the court of appeals under 28 U.S.C. § 1292(b) on December 19, 1977.

Concluding that § 437h is available to any and all potential plaintiffs, the court of appeals remanded the case to the district court to: "(1) identify the constitutional and fact issues raised by the complaint; (2) take whatever evidence the court finds necessary to a decision of those issues; (3) make findings of fact; and (4) certify the assembled record and the constitutional questions arising therefrom to this court for decision pursuant to § 437h." 591 F.2d at 36. Rejecting the Commission's opposition to certification, the district court on December 19, 1979

certified four constitutional questions to the *en banc* court of appeals, J.A. at 106-107, along with extensive findings of fact, J.A. at 48-105.[6]

On December 5, 1980, the *en banc* court of appeals rendered its decision. The court declined to overrule an earlier panel decision upholding the eligibility of

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[6] The court rejected the constitutional questions for certification proposed by plaintiff, Appellant's Brief ("App. Br.") at II, and certified the following questions to the court *en banc*:

> 1. Whether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, infringes plaintiffs' right of assembly as guaranteed by the First Amendment to the Constitution of the United States of America;
>
> 2. Whether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment of the Constitution of the United States;
>
> 3. Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, to define the term "solicitation" infringes plaintiffs' right of assembly guaranteed by the First Amendment to the Constitution of the United States, or deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States;
>
> 4. Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, to define the term "trade association," as used in 2 U.S.C. § 441b(b)(4)(D), violates the due process clause of the Fifth Amendment to the Constitution of the United States.

Appellants have not appealed to this Court the *en banc* court's decision that the absence of a statutory definition of the term "trade association" did not violate the due process clause of the fifth amendment. The court found that the term 'trade association' like 'solicitation' is a frequently used and well understood term, and that the plain and ordinary meaning of the term together with the Commission's adherence to that meaning reflected in Commission regulations, warranted this conclusion.

appellants to invoke § 437h; FECA's extraordinary jurisdictional provision.[7]

The court upheld the constitutionality of 2 U.S.C. § 441b(b)(4)(D), answering all questions certified in the negative. The court found that § 441b(b)(4)(D) "is a very narrowly drawn aspect of a statutory scheme carefully designed [by Congress] to balance a compelling governmental interest and jealously guarded First Amendment freedoms." J.S. App. at 15. The court concluded that "section 441b(b)(4)(D) serve[s] to prevent a proliferation of trade associations and solicitations which would in turn undermine the very purpose of the Act's restrictions on the use of corporate treasuries in federal elections." Further, the court observed that "the restrictions in issue here apply only where a trade association employs corporate funds" to cover the cost of solicitation and that the restrictions "serve to prevent the [§ 441b(b)(4)(D)] exception from swallowing the whole" general prohibition on corporate spending in connection with federal elections. J.S. App. at 14.

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[7] Eligible plaintiffs granted standing under § 437h are "the Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President." 2 U.S.C. § 437h, FEC App. at 1a.

SUMMARY OF ARGUMENT

I.

This case presents the threshold issue of whether parties not among the categories explicitly enumerated by Congress as eligible plaintiffs in 2 U.S.C. § 437h may invoke the appellate jurisdiction of this Court pursuant to that provision. Congress limited the use of the extraordinary procedures in § 437h to those parties which it determined to be appropriate to represent the public interest in assuring the constitutionality of the Act: "the Commission, the national committee of a political party, or any individual eligible to vote in any election for the office of President." Appellants herein are not national committees or voters, but political committees of incorporated entities which are themselves composed of corporate members. Rather than representing the public interest, they represent only their private interest in increasing their own political influence by invalidating the Act's regulation of their solicitation activities. Thus, they are not entitled to utilize § 437h as a jurisdictional base for review by this Court, but can raise their constitutional objections to the Act only at such time as the Commission seeks to enforce the Act against them. *See* 2 U.S.C. § 437g(a)(6).

Congress's express limitation on § 437h's grant of federal jurisdiction should be respected, not disregarded so as to authorize suits raising constitutional issues by any party affected by the Act. Since appellants are not eligible to invoke the appellate jurisdiction of this Court pursuant to § 437h, the Court should dismiss this case for lack of jurisdiction.

II.

Should this Court decide that it has jurisdiction, it should affirm the decision below, for 2 U.S.C. § 441b

(b)(4)(D) violates neither the first amendment nor the fifth amendment to the Constitution of the United States.

A. In essence, § 441b(b)(4)(D) is a permissive provision, which allows incorporated trade associations to utilize corporate funds to solicit political contributions from certain individuals who are not members of the trade association, but are employed by, or own stock in, corporations which are members of the trade association. In order to ensure that this permission cannot be used to circumvent the statute's general limitation on political spending by corporations through multiple trade associations serving the interests of the same overlapping corporate membership, Congress designed the statute to allow corporations to permit only one trade association per year to solicit contributions from its personnel.

Section 441b(b)(4)(D) does not affect individual freedom of speech or association at all—individuals are free to engage in a wide variety of political activities and, in particular, may join trade associations or contribute to trade association political committees if they so desire. This provision also does not interfere with political expression by trade association political committees. Rather, it only limits the ability of an incorporated trade association to utilize corporate money to solicit contributions to its separate segregated political fund, from certain individuals who have not chosen to associate with the trade association by becoming members. Section 441b(b)(4)(D) does not involve anything remotely resembling censorship, and the requirement that a trade association obtain its member corporation's consent before soliciting the corporation's employees and stockholders does not constitute the sort of prior restraint on speech which has been found to exist when

a government official exercises discretionary power to regulate expression by groups of individuals. Moreover, since this safeguard is narrowly drawn to ensure that this permissive provision cannot be utilized to circumvent the statute's other prohibitions, it serves a compelling governmental interest. *See California Medical Association* v. *Federal Election Commission*, —— U.S. ——, 101 S.Ct. 2712, 2724 (June 26, 1981).

B. Statutes which contain reasonable classifications do not violate the due process clause of the fifth amendment, and this Court has already determined that the differing treatments of different entities under this statute reasonably "reflect a judgment by Congress that these entities have differing structures and purposes that require different forms of regulation in order to protect the integrity of the electoral process." *CMA* v. *FEC*, 101 S.Ct. at 2724. Moreover, any difference in treatment under § 441b(b)(4)(D) favors, rather than disadvantages, trade associations, for that provision extends to trade associations an additional solicitation authority not enjoyed by other corporations. Since the basic classification in the statute is rationally based, it does not violate the fifth amendment, even if corporate trade associations find themselves unable to raise as much money in their political funds as they would like because of independent circumstances.

C. The term "solicit" is no more unconstitutionally vague in § 441b(b)(4)(D) than it is in any of the other statutes in which it has been upheld against vagueness challenges. Moreover, any problem in this regard is mitigated by the Act's advisory opinion procedure, which provides an opportunity for parties to obtain, in advance, a binding ruling by the Commission on the lawfulness of any proposed activity.

ARGUMENT

I. APPELLANTS, CORPORATIONS AND THEIR SEPARATE SEGREGATED FUNDS, ARE NOT ELIGIBLE PLAINTIFFS AS DEFINED BY CONGRESS IN 2 U.S.C. § 437h AND, ACCORDINGLY, HAVE NO RIGHT TO INVOKE THE JURISDICTION OF THIS COURT PURSUANT TO THAT PROVISION.

Section 437h provides that "the Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President" may file an action appropriate to construe the constitutionality of any provision of the Act. Appellants admit that they are not among the categories enumerated by Congress as eligible plaintiffs in § 437h. Indeed, far from being individuals eligible to vote, appellants are political committees of incorporated entities which are themselves composed of corporate members.[8] Thus, they are not entitled to utilize § 437h as a jurisdictional base for review by this Court.

Congress has explicated in precise terms whom it felt appropriately should be entrusted with the power to bring suit under § 437h to define and vindicate the public rights established by FECA. Clearly, in thus legislating the public rights embodied in FECA, Congress has broad latitude to determine the appropriate parties and statutory procedures to enforce those rights. *Cort* v. *Ash*, 422 U.S. 66 (1975).[9] Congress

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[8] As the court below noted, "separate segregated funds are simply the political arms of the parent organization." J.S. App. at 3. *Accord, Pipefitters*, 407 U.S. at 426.

[9] This Court has already concluded that Congress did not create a private right of action for enforcement of FECA. *Cort* v. *Ash*, 422 U.S. at 77-78.

has expressly limited the use of § 437h to those parties which it reasonably determined to best represent the public interest in assuring the constitutionality of the Act. The Commission is the independent agency established by Congress to administer and enforce the Act, 2 U.S.C. § 437c(b); *Buckley*, 424 U.S. at 109-113; the national committees of the political parties play a central role in the political process, *Democratic Party of the United States* v. *LaFollette*, —— U.S. ——, 101 S. Ct. 1010, 1024 (Feb. 25, 1981) (Powell, J., dissenting); *Branti* v. *Finkel*, 445 U.S. 507, 532 (1980) (Powell, J., dissenting); and the voters are the class for whose ultimate benefit the entire scheme of the Act, intended to ensure the integrity of the electoral system, was designed.

In contrast, corporations and their political committees, like the appellants here, do not represent the public interest, but only their own interest in maximizing their political influence. Congress has not provided them with an expedited review procedure, such as that embodied in § 437h, to assert this private interest. Rather, Congress has provided such parties, in § 437g, with an opportunity to raise their constitutional objections to the Act's restrictions on their political activities at such time as the Commission seeks to enforce those restrictions against them.[10] This procedure for obtaining judicial consideration of appellants' constitutional objections cannot be said to unduly infringe any of their rights, for it is the only procedure available for raising such constitu-

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[10] Under 2 U.S.C. § 437g(a)(6), all persons subject to Commission enforcement actions have the opportunity for *de novo* review in federal district court.

tional objections under most administrative statutes. *See, e.g., DuBois Clubs* v. *Clark*, 389 U.S. 309, 311-312 (1967); *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 772 (1947); *Grutka* v. *Barbour*, 549 F.2d 5, 9-10 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977).

The legislative history confirms that Congress intended § 437h to be read as written—to embody a limited provision for judicial review of those constitutional challenges to the Act raised by the enumerated parties representing the public interest.[11] As this Court recognized in *California Medical Association* v. *Federal Election Commission*, —— U.S. ——, 101 S. Ct. 2712, 2717 (June 26, 1981) (*"CMA* v. *FEC"*), the congressional debates indicate that this unique expeditious review provision was offered only to provide prompt judicial review of certain new provisions of the 1974 Amendments which Senator Buckley considered unconstitutional.[12] The House of

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[11] The affidavits of former Senator James Buckley and Mr. David Keene offered by appellants in an attempt to create retroactive legislative history are of no probative value. "Such statements 'represent only the personal views of these legislators since the statements were [made] after passage of the Act'." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974) *quoting National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 639 n.34 (1967). *See also Quern* v. *Mandley*, 436 U.S. 725, 736 n.10 (1978) (*"post hoc* observations by a single member of Congress carry little if any weight").

[12] In 26 U.S.C. § 9011(b) Congress adopted a similar narrow grant of standing to "the Commission, the national committee of any political party and individuals eligible to vote for President" to institute actions appropriate to implement or construe the Presidential Election Campaign Fund Act, ("Fund Act"), 26 U.S.C. §§ 9001-9013. Congress sought by the enactment of § 9011(b) to extend federal court jurisdiction to hear and decide, on an expedited basis, questions of the proper construction of the Fund Act so that

Representatives was particularly concerned that § 437h not be read to encourage a multiplicity of suits which could strain the resources of the federal courts due to the *en banc* requirement. Mark-up—Federal Election Campaign Act Amendments of 1974, Committee on House Administration, 93d Cong., 2d Sess. at 705 (1974). *See also CMA* v. *FEC*, 101 S.Ct. at 2725-2728 (Stewart, J., dissenting). And, as previously noted, Congress explicitly assured that private parties had ample opportunity to protect themselves against constitutional injuries alleged to result from the enforcement of the statute against them.[13]

Congress possesses plenary authority to determine the limits of its jurisdictional statutes,[14] and they should be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok* v. *Immigration & Naturalization Service*, 392 U.S. 206, 212 (1968). Moreover, a narrow construction of statutes authorizing direct appeals to this Court, such as § 437h, has been

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public financing for presidential or vice presidential candidates would not interfere with the normal operation of political campaigns. S. Conf. Rep. No. 92-553, 92d Cong., 1st Sess., 53-54 (1971); 117 Cong. Rec. 45,855, 45,857 (1971). Similar considerations regarding interruption of the enforcement and administration of FECA may have influenced Congress's designation of the same classes of eligible plaintiffs in § 437h.

[13] The language employed in § 437h is in direct contrast to other provisions of the Act authorizing broader access to judicial review. For example, 2 U.S.C. § 437g(a)(8) provides for limited judicial review of the Commission's dismissal of an administrative complaint or failure to act on a complaint within 120 days in suits by "any party aggrieved."

[14] *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 372 (1978); *Palmore* v. *United States*, 411 U.S. 389, 400-401 (1972); *Lockerty* v. *Phillips*, 319 U.S. 182, 187 (1943).

found to be particularly appropriate. *See, e.g., Key* v. *Doyle*, 434 U.S. 59, 66 (1977); *Palmore* v. *United States*, 411 U.S. at 396; *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970). Accordingly, several courts have construed § 437h's grant of federal jurisdiction narrowly. *See, e.g., Martin Tractor* v. *Federal Election Commission*, 460 F. Supp. 1017, 1019 (D.D.C. 1978), *aff'd*, 627 F.2d 375 (1980), *cert. denied, sub nom. National Chamber Alliance for Politics* v. *Federal Election Commission*, 449 U.S. 954 (1980); *Republican National Committee* v. *Federal Election Commission*, 461 F. Supp. 570, 577 (S.D.N.Y. 1978); *Buckley* v. *Valeo*, 387 F. Supp. 135, 142 n.14 (D.D.C. 1975).

The decisions of this Court in *Buckley, supra*, and *CMA* v. *FEC, supra*, are not to the contrary. While both concluded that the courts' jurisdiction in suits properly brought under § 437h was to be construed as broadly as permitted by Article III, neither of those cases remotely suggested that parties who are not among those designated by Congress are eligible to invoke this Court's jurisdiction under § 437h.[15] In fact, although neither of those decisions addressed the specific issue raised in the instant action,[16] in each case the Court specifically noted that at least the individual plaintiffs before it fell within § 437h's categories of permissible plaintiffs.

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[15] Particularly where the jurisdiction conferred is so broad, "a clearer indication of congressional intent . . . is required to extend this Court's mandatory appellate jurisdiction." *Key* v. *Doyle*, 434 U.S. at 66 n.12. *See also Muskrat* v. *United States*, 219 U.S. 246 (1911).

[16] In *CMA* v. *FEC*, 101 S.Ct. at 2717 n.6, the Court expressly declined to decide whether parties not enumerated in § 437h's grant of standing may nonetheless raise constitutional claims pursuant to that section.

CMA v. *FEC*, 101 S.Ct. at 2717 n.6; *Buckley*, 424 U.S. at 11-12. In the present case, none of the appellants are within those categories, and none are individuals. Rather, they are separate segregated funds and incorporated trade associations composed of corporate members.

In sum, a limited construction of FECA's extraordinary judicial review provision, 2 U.S.C. § 437h, is supported by the statute's express language, the traditional concepts of statutory construction, and the legislative history, and is consistent with the prior decisions of this Court. Because appellants are not eligible to invoke the appellate jurisdiction of this Court pursuant to § 437h, this Court should dismiss this case for lack of jurisdiction.

II. SECTION 441b(b)(4)(D) OF FECA DOES NOT VIOLATE EITHER THE FIRST OR THE FIFTH AMENDMENT.

The legislative history of § 441b demonstrates that Congress has long considered large-scale election activity by corporations and labor organizations to present special dangers for the integrity of the election process. Congress determined first that corporations', and later that labor organizations', aggregations of wealth presented such disruptive power and influence in connection with federal elections that prohibition of contributions and expenditures by these entities was necessary. *See Pipefitters*, *supra*; *U.S.* v. *CIO*, *supra*; *U.S.* v. *UAW*, *supra*.

The § 441b statutory scheme is the result of Congress's continuing reassessment of the delicate balance between the important governmental interests served by the prohibition and the special interests of those persons who make up the corporation or who are members of the labor organization. Thus, as a

result of continuing deliberation over the entire § 441b scheme, Congress incorporated the balance into the statute by continuing the general prohibition on the use of corporation funds and excepting from it certain types of expenditures, including the use of corporate or union money to establish, administer and solicit contributions to separate segregated funds, where such expenditures were warranted because of the strong interest in permitting sponsorship of political activity for those "closely affiliated" with the corporation or union. *CMA* v. *FEC*, 641 F.2d 619, 630 (9th Cir. 1980) (en banc) *aff'd* —— U.S. ——, 101 S.Ct. 2712 (June 26, 1981).

Section 441b(b)(4)(A) permits corporate trade associations, like other corporations, to use corporate funds to establish and support their own separate segregated funds in addition to those established by their corporate members, and to use general treasury funds to solicit contributions to such funds from their own stockholders and executive and administrative personnel. Congress has also enacted two additional exceptions to § 441b that apply to trade associations: § 441b(b)(4)(C) permits a corporate trade association to use corporate monies to solicit contributions to its fund from its individual members, and § 441b(b)(4)(D) permits them to solicit contributions from the stockholders and executive and administrative personnel of consenting member corporations.[17] Concerned over the impact of the latter exception on the individual stockholder and employee,

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[17] Senator Cannon, the floor leader and primary sponsor of the 1976 amendments in the Senate, explained the purpose of these additional sources of solicitees for trade associations as follows:

> The Conference bill adopted the House provisions *giving trade associations rights to solicit stockholders and execu-*

and concerned that the new § 441b(b)(4)(D) not become a means by which corporations could circumvent the § 441b prohibition through a proliferation of trade associations, each with its own separate segregated fund, Congress incorporated safeguards into the provision, which allow a corporation to give permission only to one trade association each year to solicit its stockholders and executive and administrative personnel.

In this case, appellants do not challenge the constitutionality of § 441b(a), the general prohibition against direct and indirect corporate and union contributions and expenditures in connection with federal elections; nor do they challenge the limitations in § 441b(b)(4)(A) upon the categories of individuals which may be solicited with corporate money for contributions to a separate segregated political fund. Rather, appellants challenge only § 441b(b)(4)(D), the function of which is to permit incorporated trade associations to use corporate funds to solicit an additional pool of individuals—the stockholders, executive and administrative personnel of its consenting member corporations. Appellants contend that the safeguards built into this permissive provision somehow violate their first and fifth amendment rights, and ask this Court to broaden the § 441b(b)(4)(D)

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tive or administrative personnel of a member corporation. . . .

[The provision] applies only to trade associations with corporate members and is intended to regulate solicitation of the stockholders and executive or administrative personnel of such corporate members. A trade association which is a membership organization may, of course, solicit its other members, such as individuals, partnerships, et cetera, under section 321(b)(4)(C).

122 Cong. Rec. S6365 (daily ed. May 3, 1976) (remarks of Sen. Cannon) (emphasis added), *1976 Legis. Hist.* at 1091.

exception to § 441b(a) even further than permitted by Congress, to allow incorporated trade associations to use their corporate funds to solicit contributions to their separate segregated funds from anyone having an "affinity of interest."[18] App. Br. at 36. As we demonstrate below, not only are appellants' constitutional arguments incorrect, but the entire premise of their case misconstrues the operation of the statute. For as the court of appeals observed, invalidating § 441b(b)(4)(D) would "make any solicitation [by a trade association] of its corporate member's shareholders and administrative/executive personnel unlawful because such solicitations are prohibited under Section 441b(b)(4)(A) except as provided in Section 441b(b)(4)(D)." J.S. App. at 14.

A. 2 U.S.C. § 441b(b)(4)(D) is consistent with the right of assembly guaranteed by the first amendment.

The right of association, which springs from the first amendment rights of speech and assembly, grants to individuals the right to join together to address and inform the government and others on issues of vital concern. *See Thomas* v. *Collins*, 323 U.S. 516 (1945); *Hague* v. *CIO*, 307 U.S. 496 (1939); *De Jonge* v. *Oregon*, 299 U.S. 353 (1937). However, nothing in § 441b in any way affects the ability of anyone to assemble to petition the government for redress of grievances. To the contrary, trade associations are completely free to solicit anyone to become a member of the trade association, and thus to participate in any activities the membership of the trade association chooses to undertake, including political discussions, lobbying activities,

[18] Congress specifically rejected the "affinity of interest" standard advocated by appellants here. 122 Cong. Rec. S3518 (daily ed. March 16, 1976) (remarks of Sen. Cannon). *See* note 31, *infra*.

and being solicited to contribute to the trade association's separate segregated fund.[19] Moreover, the individuals who manage the trade association are free to set up a political committee which is not maintained by corporate funds, and to solicit anyone for contributions. The only instance in which section 441b comes into play at all, is when the incorporated trade association chooses to utilize corporate money in connection with federal elections. It is solely the use of corporate money, and not the freedom of individuals to associate for any purpose, which is limited by Section 441b. Moreover, even in this narrow area, the only way in which any individuals are affected by § 441(b)(b)(4)(D) is that they will not be solicited for contributions to a political fund controlled and operated by a trade association with which the individual has not chosen as associate by becoming a member. Moreover, as this Court has held twice before, political contributions are "not the sort of political advocacy . . . entitled to full First Amendment protection." *CMA* v. *FEC*, 101 S.Ct. at 2722.

> While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate *involves speech by someone other than the contributors.*

CMA v. *FEC*, 101 S.Ct. at 2722 (emphasis in original), *quoting Buckley*, 424 U.S. at 21.

In any event, these rights are not absolute. *Buckley*, 424 U.S. at 25; *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 567 (1973). *See also United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). Where a "sufficiently important" governmental interest can be shown, regulation

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[19] *See* Findings of Fact 4, 5, 6, 47, 48, 177-180, J.A. at 49, 60, 73, 95-96.

of such activities is permissible. *Buckley*, 424 U.S. at 25. *See also Village of Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) ("[s]oliciting financial support is undoubtedly subject to reasonable regulation . . ."; *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 50-51 (1961). Even if this Court concludes that § 441b(b)(4)(D) results in in some infringement of individual rights, the interests served by this statute are sufficiently important to justify such minimal intrusion on individuals' first amendment rights.

The § 441b prohibition on contributions and expenditures by corporations and labor organizations is part of a comprehensive and well balanced system chosen by Congress to regulate the influence and use of corporate funds in federal elections and at the same time protect the interests of those persons closely connected with the corporation or union.[20] The legislative history of § 441b indicates that election law reform was enacted in response to public sentiment aroused by rumors of large campaign coffers being amassed and used by corporations and labor unions to influence elections. *U.S.* v. *UAW*, 352 U.S. at 579. As this Court noted in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788 n.26, *reh. denied*, 438 U.S. 907 (1978), "[t]he overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act [2 U.S.C. § 441b(b)] was the problem of corruption of elected representatives

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[20] This Court has recognized Congress's power to regulate federal elections and evaluate the need for remedial legislation to protect the integrity of the federal electoral process. *See* United States Constitution, art. I, § 4; *Buckley*, 424 U.S. at 13 n.16, 18, 19; *Ex parte Siebold*, 100 U.S. 371, 383 (1879). *See also Pipefitters, supra; U.S.* v. *UAW, supra; U.S.* v. *CIO, supra.*

through the creation of political debts . . . . The importance of the governmental interest in preventing this occurrence has never been doubted." *Citing U.S.* v. *UAW*, 352 U.S. at 570-575; *Schwartz* v. *Romnes*, 495 F.2d 844, 849-851 (2d Cir. 1974). Thus, as the court of appeals here concluded:

> [t]he transcendant legislative objective served by the Federal Election Campaign Act is the elimination of corruption and the appearance of corruption in the federal election process. The restriction imposed by section 441b of the Act on labor organizations and corporations, including incorporated trade associations are designed to serve both this objective and the additional objective of protecting individuals from economic coercion. *U.S.* v. *UAW*, 352 U.S. 567, 570-84; *U.S.* v. *CIO*, 355 U.S. 106, 113.

J.S. App. at 10. For these reasons, federal courts have consistenly declined to hold § 441b and its predecessor, 18 U.S.C. § 610, unconstitutional. *See Pipefitters, supra; U.S.* v. *UAW, supra; U.S.* v. *CIO, supra; CMA* v. *FEC, supra; Federal Election Commission* v. *Lance*, 635 F.2d 1132 (5th Cir.) (en banc), *cert. denied*, —— U.S. ——, 101 S.Ct. 3151 (July 2, 1981).[21] Because of the importance of this statutory prohibition, Congress has narrowly limited

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[21] Indeed, every lower federal court which has been presented with the question has expressly found § 441b to be constitutional. *See United States* v. *Chestnut*, 533 F.2d 40, 51 n.12 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *United States* v. *Boyle*, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973); *United States* v. *Pipefitters Local Union No. 562*, 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, *rev'd on other grounds*, 407 U.S. 385 (1972); *Federal Election Commission* v. *Weinsten*, 462 F. Supp. 243 (S.D.N.Y. 1978); *United States* v. *Clifford*, 409 F. Supp. 1070, 1072 (E.D.N.Y. 1976); *United States* v. *Brewers' Association*, 239 F. 163 (W.D. Pa. 1916).

the use of corporate and union treasury funds in federal elections to those instances in which the interests of "closely affiliated" individuals in having their political activity sponsored by their corporation or union is particularly strong. *CMA* v. *FEC*, 641 F.2d at 630.

The restrictions on solicitation in § 441b(b)(4)(D) clearly serve compelling governmental interests. While reassessing the equities involved in drafting the exceptions to § 441b in 1976, Congress became concerned that proliferation of separate segregated funds of corporations and labor organizations could be used to circumvent FECA's contribution limitations. Congress dealt with the problem of directly affiliated political committees in § 441a(a)(5), which provides that all political committees set up by a single corporate entity, labor organization or any person are considered to be a single committee with a single contribution limitation. *See* H.R. Rep. No. 94-1057, 94th Cong., 2d Sess., at 58 (1976). In balancing the aims of the statute, Congress accommodated the special interests of the trade associations and permitted, without triggering § 441a(a)(5), some cross-solicitation under § 441b(b)(4)(D). However, the limitation in § 441b(b)(4)(D) on the number of trade associations which a corporation may permit to solicit its personnel serves a purpose similar to that of §441a(a)(5) with respect to separate segregated political funds set up by trade associations for the benefit of their corporate members.

The record shows that in many instances business corporations belong to numerous trade associations which advocate the views of, and provide services for, the various business concerns which the member corporations have. Finding 9, J.A. at 50. In addition,

a substantial number of the federated members [22] belong to one or more trade associations. Findings 26, 56, J.A. at 55, 63. Thus, there exists an enormous amount of overlapping of membership. Further, a corporate member of a trade association may contribute funds to its trade association to be used to defray the operational, administrative and solicitation expenses of the trade association's separate segregated fund. AO 1980-59, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5515. Without the provision in § 441b(b)(4)(D) limiting the number of trade associations that can solicit political contributions from stockholders and administrative and executive personnel, business corporations would be able indirectly to establish, finance, maintain and control numerous separate segregated funds through trade associations and federations of trade associations, set up to serve their interests, and thus circumvent the § 441b prohibition.[23] As the court below found, since a corporation may become a member of many trade associations, "the restrictions in § 441b(b)(4)(D) serve to prevent a proliferation of trade associations and solicitations which would in turn undermine the very purpose of the Act's restrictions on the use of

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[22] For example, NLBMDA is a federation of 27 local, State and regional associations. Finding 24, J.A. at 54.

[23] This Court should defer to the limit chosen by Congress, which reflects Congress's judgment of what "best accommodates the competing interests involved." *Buckley*, 424 U.S. at 103; *Rostker* v. *Goldberg*, —— U.S. ——, 101 S.Ct. 2646, 2651 (June 25, 1981).

> [W]hen it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

Buckley, 424 U.S. at 83 n. 111, *quoting Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting).

corporate treasuries in federal elections." J.S. App. at 14. Thus, "the restrictions placed on the potential pool of solicitees serve to prevent the exception from swallowing up the whole," J.S. App. at 19, which this Court has found in an analogous situation to be a compelling interest for regulating political contributions. *CMA* v. *FEC*, 101 S.Ct. at 2722-2723.

To be sure, to pass muster under the first amendment, regulations that affect individual freedom of expression must be precisely and narrowly drawn to further the interests identified and be the least restrictive means of protecting those governmental interests. *Buckley*, 424 U.S. at 65; *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-618 (1973). *But see*, *CMA* v. *FEC*, 101 S.Ct. at 2723 n.20. As the court below concluded, the provision at issue here is a "very narrowly drawn aspect of a statutory scheme carefully designed to balance a compelling governmental interest and jealously guarded First Amendment freedoms." J.S. App. at 15. *See also CMA* v. *FEC*, 641 F.2d at 631. Thus as discussed previously, FECA does not prohibit incorporated trade associations, like any other corporations, from disseminating information which is not connected with federal elections; nor does it prohibit trade associations from soliciting anyone to join the trade association, who may then be solicited with corporate money for political contributions. And it specifically permits incorporated trade associations, like all other corporations, to use corporate funds to: communicate freely with their members, stockholders and executive and administrative personnel and their families on any subject, § 441b(b)(2)(A); conduct non-partisan registration and get-out-the-vote campaigns aimed at their members, stockholders, and executive and administrative personnel and their families, § 441b(b)

(2)(B); establish, administer and solicit contributions to a separate segregated fund to be used for political purposes by the corporation, § 441b(b)(2)(C); solicit political contributions freely from their individual membership, § 441b(b)(4)(C); and solicit political contributions from their own employees twice yearly under certain circumstances. And section 441b(b)(4)(D), at issue here, permits incorporated trade associations to use corporate monies to solicit political contributions from the stockholders, and executive and administrative employees, and their families, of consenting corporate members. Thus, FECA, including § 441b(b)(4)(D), clearly does not limit trade associations to soliciting contributions only from the stockholders and executive and administrative employees of their member corporations, as appellants suggest, and it does not restrict issue discussion in any way. *See also* 11 C.F.R. § 114. Indeed, the record in this case indicates that trade associations do engage in a myriad of first amendment activities without any restraint or interference by FECA.[24] In sum, as the court of appeals concluded,

> [n]othing in § 441b(b)(4)(D) limits the expression or dissemination of political ideas and information either to individuals described in the section or to any other individual. Indeed there has been no showing that this provision has had or could have any prior restraining effect whatsoever on the free flow of political information and opinion by trade associations or their political committees. Nor does § 441b(b)(4)(D) prohibit trade associations from joining the shareholders and executive or administrative employees of its member corporations to it in

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[24] *See* Findings 4, 5, 6, 36, 37, 41, 42, 44, 90, 92, J.A. at 49, 58-59, 60, 72, 73, for types of activities engaged in by appellants.

common cause. They are free to solicit any individual to join their trade association.

J.S. App. at 12-13.[25]

Appellants contend, however, that a "fundamental right of the potential contributor to . . . engage in political association through the pooling of political contributions" is abridged by § 441b(b)(4)(D), because their separate segregated funds would serve to "amplify" the political voices of the individual employees of their member corporations, if those employees could be solicited. App. Br. at 21. However, as this Court has recognized, a separate segregated fund established and maintained by a corporation is but an extension of the corporation, the only separation being a separate account. *Pipefitters*, 407 U.S. at 413-17, 421, 429. And, as the record in this case shows, the trade associations' purpose for existence is to serve their corporate members' commercial interests.[26] Clearly then, the only voice "amplified" by the trade association's separate segregated fund is that of the trade association, speaking for the business interests of its corporate members, and not the voices of individuals who are employed by the corporate members. *See* Findings 4, 5, J.A. at 49; Findings 40-45, J.A. at 60; Finding 49, J.A. at 61; Findings 67-69, J.A. at 65-67; Findings 91, 92, J.A. at 73-74.

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[25] The court of appeals noted that Judge Marshall's uncontested findings of fact set forth in the record clearly establish that "plaintiffs are engaged on a daily basis," and are "unimpeded" by § 441b(b)(4)(D), in a "broad range of first amendment activities." J.S. App. at 13.

[26] The record in this case demonstrates that to serve this end trade associations "undertake such activities as government relations, lobbying on specific legislation, education, information dissemination advertising" and "meeting with regulators and legislators to present the industries' view point." Findings 4, 6, J.A. at 49.

Moreover, nothing in § 441b purports to limit the activities of individuals at all—it is solely a limitation upon the use of corporate and union funds in connection with federal elections. Any individual may associate with appellants by joining their associations, and may then engage freely in all aspects of appellants' activities, including being solicited to contribute to their separate segregated funds.[27] Section 441b affects only the *corporations'* ability to use corporate funds to solicit political contributions from certain individuals who have *not* chosen to become members of the associations. For these reasons, appellants' attempt to wrap their corporate interests in the mantle of individual freedoms is unavailing.

Finally, appellants contend that by limiting them to using corporate funds to solicit contributions from stockholders and executive and administrative personnel only from consenting member corporations, § 441b(b)(4)(D) operates as a prior restraint on their freedoms of speech and association. Since appellants did not request that the prior restraint issue be certified to the court of appeals *en banc*, and the issue was not certified under § 437h, J.S. App. at 30, n.2, the Commission believes that this Court need not reach this question. However, the *en banc* court of appeals did consider it, and correctly dismissed the prior restraint argument as "tenuous." J.S. App. at

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[27] In addition, the individual remains free: to make unlimited direct expenditures to influence federal elections; to volunteer his or her personal services on behalf of any candidate or committee; to use real or personal property and provide invitations, food and beverages up to $1,000 in an election; to contribute up to $1,000 per election to any federal candidate and up to $5,000 to any political committee. The individual employee may also be solicited for contributions and contribute to the separate segregated fund set up by the corporation which employs the individual. *See also* 2 U.S.C. § 441a(d)(2).

14. For FECA does not provide for any form of prior censorship of first amendment activity.[28] Indeed, although in some circumstances regulation of speech by government officials has been found to be an unconstitutional "prior restraint" on speech,[29] this Court has never held a private corporation's refusal to permit outsiders to solicit its employees to be an unconstitutional prior restraint.[30] Thus, it would appear that appellants' prior restraint argument is nothing more than a restatement, under another label, of their argument that they have a constitutional right to use corporate funds to freely solicit political contributions from the employees and stockholders of their member corporations, an argument we have already shown to be erroneous.

Appellants argue that § 441b(b)(4)(D) has given their corporate members "unbridled power" to determine whether to allow solicitations of their employees and stockholders by the trade associations to which they belong. However, even under appellant's theory,

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[28] This Court has recognized that a distinction exists between regulation and censorship. *See Poulus* v. *New Hampshire*, 345 U.S. 395, 408 (1953), *citing Near* v. *Minnesota*, 283 U.S. 697, 712 (1931). *See also, Konigsberg* v. *State Bar of California*, 366 U.S. at 50 (regulation not designed to control content permissible when supported by sufficient governmental interest).

[29] *See, e.g., Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975).

[30] As this Court explained in *Hudgens* v. *NLRB*, 424 U.S. 507, 513 (1976):

> [W]hile statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.

corporations could exercise the same power simply by not joining a trade association. Thus, the provision in § 441b(b)(4)(D) which appellants call a "prior restraint" merely enables corporations to join a trade association without being legally required to expose their employees to additional political solicitation by the trade association. Appellants would have the law require that one of the conditions of joining a trade association must be the granting of solicitation rights by the corporate entity. Appellants thus demand the "unbridled" right to go behind their direct relationship with their corporate members, and solicit contributions to their own political committees from individuals whose only connection with the trade association is that they happen to work for, or own stock in, a corporation which may have joined the trade association for entirely nonpolitical reasons. Whatever might be said for this argument on policy grounds, Congress clearly had compelling reasons for rejecting it,[31] and building safeguards against prolif-

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[31] To support the "affinity of interest" standard for solicitation which appellants propose—a standard specifically rejected by Congress, 122 Cong. Rec. S3518 (daily ed. Mar. 16, 1976) (remarks of Sen. Cannon)—appellants cite to a letter written by Richard Thornburgh. App. Br. at 36. This Court has recognized the unpersuasiveness and questionable reliability of such observations as to congressional intent when compared with articulated purposes to the contrary as set forth in the legislative history. In *Pipefitters*, 407 U.S. at 425 n.39, this Court quoted Representative Hays' observation:

> I will say to the gentleman that what he is saying will be the legitimate legislative history and that . . . some Assistant Attorney General's opinion [referring to Mr. Thornburgh] . . . is worth as much as the piece of paper it is printed on, no more and no less. 118 Cong. Rec. 328 (remarks of Rep. Hays).

See also State of Minnesota v. *Clover Leaf Creamery Co.*, —— U.S. ——, 101 S.Ct. 715 (Jan. 21, 1981).

eration into this permissive provision.[32] As the court of appeals concluded:

> "[t]o the extent that the corporate approval requirement has a 'prior restraining' effect on the solicitations only allowed by virtue of Section 441b(b)(4)(D) itself, we think it both tenuous and amply justified by the necessity of providing a mechanism to prevent the exception from swallowing the whole."

J.S. App. at 14.

In sum, it is clear that appellants are only concerned here with their inability to use corporate treasury funds to "freely solicit contributions from shareholders and employees of their member corporations for use by their own political committee[s]." J.S. App. at 14. Indeed, as the court below recognized,

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[32] This Court has stated that "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation," *State of Minnesota* v. *Clover Leaf Creamery Co.*, —— U.S. ——, 101 S.Ct. at 726 *citing Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963). *See also Buckley*, 424 U.S. at 260. (White, J., concurring in part and dissenting in part). Even in the first amendment area, this Court has declared that "[t]he judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment . . . casts its claims under the umbrella of the First Amendment." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103 (1973). *See also Fullilove* v. *Klutznik*, 448 U.S. 448 (1980). Rather, when faced with "a complex problem with many hard questions and few easy answers," the Court does "well to pay careful attention to how the other branches of Government have addressed the same problem," and how Congress has examined legislative developments. *Id.* It is the Congress which has the resources and the power to inform itself and is the appropriate forum where the conflicting pros and cons are presented and considered. *United States* v. *Robel*, 389 U.S. 258, 276 (1967). *See also Rostker* v. *Goldberg*, —— U.S. ——, 101 S.Ct. at 2651.

the same individuals who organized these committees are free to organize a political committee "independent of, rather than merely segregated from, the corporate treasury and corporate funds and thereby be free to solicit 'the world.'" J.S. App. at 19. However, once a voluntary decision is made to take advantage of the Act's provision allowing unlimited use of corporate treasury funds to establish, support, and solicit contributions to a separate segregated fund, incorporated trade associations are bound by the limitations of § 441b like all other corporations and unions. Since the record demonstrates that the restriction on solicitation does not impinge on appellants' ability to freely discuss issues and is applicable only where the trade association employs corporate funds to conduct its solicitations, the court below properly concluded that "Section 441b(b)(4)(D) does not impermissibly infringe upon plaintiff's right of assembly." J.S. App. at 16.

B. 2 U.S.C. § 441b(b)(4)(D) is consistent with the due process clause of the Fifth Amendment.

Though the fifth amendment has no equal protection clause, "discrimination may be so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). Thus "equal protection analysis in the fifth amendment area is the same as that under the fourteenth amendment . . .", *Buckley*, 424 U.S. at 93. This Court has also recognized that classification itself does not deprive anyone of equal protection of the laws. *Carrington* v. *Rash*, 380 U.S. 89, 92 (1965), *relying on Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955), *reh. denied*, 349 U.S. 925 (1955). *See State of Minnesota* v. *Clover Leaf Creamery Co.*, *supra*. Virtually all legislation involves some degree of classification, and this Court has consistently upheld federal statutes which estab-

lish reasonable classifications. *Buckley*, 424 U.S. at 93-108; *Schlesinger* v. *Ballard*, 419 U.S. 498, *reh. denied*, 420 U.S. 966 (1975); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *United States* v. *Rock Royal Co-op*, 307 U.S. 533, 562-568 (1939).

This Court has previously affirmed the conclusion of another court that the provisions of § 441b limiting the activities of corporations and labor organizations are "even handed and entirely neutral on their face." *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280, 288 (S.D.N.Y.) (three-judge court), 616 F.2d 1 (2d Cir. 1979) (en banc) (per curiam), *aff'd mem.*, 445 U.S. 955 (1980). Thus, in order to establish that § 441b (b)(4)(D) "violates the equal protection component of the fifth amendment" appellants must demonstrate that this "provision of the Act burdens the First Amendment rights of [trade associations] to a greater extent than it burdens the same rights of [other] corporations and unions, and that such differential treatment is not justified." *CMA* v. *FEC*, 101 U.S. at 2724.

As in *CMA*, however, the Court need not consider the second question of "whether the discrimination alleged by appellants is justified" because there is no such discrimination against trade associations. *Id.* For as the court of appeals noted, appellants' argument that FECA through § 441b(b)(4)(D) "imposes far more restrictions on trade association PACs than other political committees," is a "misreading of the statute." J.S. App. at 17. Under the statute and Commission regulations, trade associations are permitted to exercise the same solicitation rights under 2 U.S.C. § 441b(b)(4)(A) and (B) as all other corporations, and in addition are permitted under § 441b(b)(4)(D) to solicit contributions to their

political funds from the executive and administrative employees of consenting corporate members. Further, as membership organizations or corporations without capital stock, trade associations can also solicit their individual and non-corporate members under 2 U.S.C. § 441b(b)(4)(C) and 11 C.F.R. § 114.8. Any disparity which exists favors rather than disadvantages incorporated trade associations. Thus, as in *CMA* v. *FEC*, 101 U.S. at 2724, "appellants' claim of unfair treatment ignores the plain fact that the statute as a whole imposes far *fewer* restrictions on [incorporated trade associations] than it does on [other] corporations or unions." [33]

Appellants argue that the Act violates the fifth amendment because trade associations are not treated precisely the same as other corporations and labor organizations. However, the concept of equal protection means that laws must apply alike "to all in the same situation." *Southern Railway Co.* v. *Greene*, 216 U.S. 400, 412 (1910). Thus, as the court of appeals concluded, this argument "runs afoul of [appellants'] failure to demonstrate how trade as-

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[33] Since § 441b(b)(4)(D) was clearly intended to benefit trade associations, it can hardly be found to be the result of "purposeful discrimination" against trade associations, an essential element of an equal protection argument. *City of Mobile* v. *Bolden*, 446 U.S. 55, 66 (1980), *citing Washington* v. *Davis*, 426 U.S. 229 (1951); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). As this Court has explained:

> 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.

Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256, 279 (1979) (citations omitted).

sociations and labor organizations are 'similarly situated' parties." J.S. App. at 20. Indeed, Congress expressly recognized that trade associations, which represent corporate members, are different from organizations which are comprised of, or represent, individual members, *e.g.*, membership organizations, cooperatives and labor organizations. For those organizations Congress permitted solicitation of their individual members for contributions to their separate segregated funds; for the ordinary business corporation, it allowed solicitation of individuals closely affiliated with that corporation (*i.e.*, stockholders and executive and administrative personnel) for contributions to its separate segregated fund. However, Congress permitted trade associations to go beyond their immediate membership, and solicit contributions from individuals who have no connection with the trade association at all, but who are closely associated with its corporate member, whose consent the trade association must obtain before soliciting those individuals. Thus, as the court of appeals found, the relationship between a union and its own members "differs significantly" from the second hand relationship between a trade association and the stockholders and administrative and executive personnel of the separate corporations which are its members. J.S. App. at 19. As the court reasoned:

> Individuals join with other individuals in common cause as members of their union, and the union thus becomes their representative organization. A trade association is also a representative organization, *but it exists to promote the interests of its corporate and individual members, not the interests of the employees of its corporate members.*

Id. (emphasis added). Thus, the court below correctly concluded that the subsections to § 441b(b)(4)

were appropriately designed to address "differing groups [with] different structure[s] and a different kind of constituency . . . each [of which] requires somewhat different regulation to curb abuses the Act was intended to halt." J.S. App. at 18. Indeed, this Court has itself held that Congress's differing treatment of different entities in this statute properly "reflect[s] a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *CMA* v. *FEC*, 101 S.Ct. at 2724.

Appellants nevertheless argue that § 441b as a whole adversely affects their political fundraising because, they assert, unlike large for-profit corporations, incorporated trade associations have "no stockholders . . . small executive and administrative staffs and few . . . rank and file employees" to solicit. App. Br. at 44. Appellants ignore their freedom to recruit and solicit non-corporate members under § 441b(b)(4)(C), and protest the fact that they do not have individuals from whom they may solicit contributions under other § 441b exceptions, contending that this circumstance gives them a constitutional right to solicit contributions without regulation from all the stockholders, executive and administrative personnel of their corporate members. What this argument amounts to is the assertion that, while the statute is fair on its face, it affects appellants more harshly because of their independent circumstances, like a law against stealing bread affects a poor person more harshly than a rich person. App. Br. at 44. But this sort of disparate impact is insufficient to render this statute unconstitutional any more than a law against stealing bread is unconstitutional because of its disparate impact on the poor. *See, e.g., Ross* v. *Moffitt*, 417 U.S. 600, 611-612 (1974); *San Antonio Inde-*

pendent School District v. *Rodriguez*, 411 U.S. 1, 24 (1973). So long as "the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. at 272. In any event, through § 441b(b)(4)(D), Congress has acted to ameliorate the very complaint appellants raise by permitting them to solicit the individuals they seek to solicit, under reasonable safeguards to ensure that this cannot become a means to circumvent the statute's other limitations. *See discussion* at 24-26, *supra*.

C. 2 U.S.C. § 441b(b)(4)(D) is neither unconstitutionally vague nor overbroad.

It is well-established that the test for unconstitutional vagueness of a statutory phrase is whether people "of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Baggett* v. *Bullitt*, 377 U.S. 360, 367 (1964); *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926) *quoted in Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961); *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972). The term "solicit" as used in FECA falls far short of this standard. Indeed, as the court below noted, "statutes and rules using the term 'solicit' have been uniformly upheld" by this Court.[34]

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[34] *See Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412, 438 (1978); *Baggett* v. *Bullitt*, 377 U.S. 360, 367 (1964). *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945); *See also Sargent* v. *Genesco*, 492 F.2d 750, 767 (5th Cir. 1974); *SEC* v. *May*, 229 F.2d 123 (2d Cir. 1956); *National Right to Work Committee, et al.* v. *Federal Election Commission*, 501 F. Supp. 422, 430-431 (D.D.C. 1980), *rev. on other grounds*, —— F.2d ——, Nos. 80-1487, 1488 (D.C.Cir. Sept. 4, 1981); *United States* v. *Guterma*, 189 F. Supp. 265 (S.D.N.Y. 1960).

J.S. App. at 20. Numerous federal statutes use the term "solicitation" without further definition, and this Court has not found it necessary to define the term "solicitation" nor required any further legislative definition to interpret the term when used in a statutory section. *Accord, Village of Schaumberg* v. *Citizens for a Better Environment*, 441 U.S. 620 (1980). Thus, the court of appeals properly concluded that failure to define the phrase "soliciting contributions" did not render § 441b(b)(4)(D) unconstitutionally vague.

Appellants nevertheless argue that the term "solicitation" is so inherently vague that its allows the FEC to become a "super-governmental censor" by disregarding the dictionary definition of solicitation. App. Br. at 49. Appellants base this argument primarily on *Martin Tractor* v. *FEC*, *supra*, and their mischaracterization of several advisory opinions issued by the Commission.

In *Martin Tractor* the court did note, as appellants suggest in their brief, that the "inherent vagueness of the term 'solicit' . . . might at first glance be thought to militate in favor of reaching the merits of appellants' claims regarding apparent chill of their first amendment rights caused by an overbroad statute." 627 F.2d at 384. However, the court refused to hold the provision or the statute unconstitutionally vague, finding that "the extent of the chill [on first amendment rights] induced by the statutory provision at issue [was] a very limited one." *Id.* The court in *Martin Tractor* recognized, as did the court of appeals in this case, that the advisory opinion mechanism in FECA "offers a prompt means of resolving doubts" as to the statute's reach and "mitigates whatever chill may be induced by the

statute." *Martin Tractor*, 627 F.2d at 384-5.[35] Indeed, the court below noted that appellants' confusion could have been, and still can be, easily clarified by the Commission if they would simply avail themselves of the advisory opinion process under § 437f.[36]

The Commission, vested by Congress with exclusive jurisdiction with regard to FECA, has the primary responsibility to determine when petitioned what is or is not permissible under the Act.[37] The Commission acts pursuant to this authority in issuing advisory opinions such as those discussed by appellants. Rather than utilizing FECA's advisory opinion procedure, however, appellants ask this Court to hold the statute unconstitutionally vague merely because of the unremarkable fact that the Commission has reached different results when presented with different sets of facts and circumstances.[38] *See*

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[35] In *Martin Tractor*, the court discussed the term *"solicit"* in connection with two other provisions of the same subsection of the Act at issue here, § 441b(b)(4)(A) and (B).

[36] Had appellants requested the Commission to issue an advisiory opinion on their specific situation, the Commission would have been required to make such a request public, to accept public comments and to issue the opinion within a statutory time restraint. Congress has ensured that persons to whom advisory opinions are issued and persons involved "in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which" an advisory opinion was rendered may rely on the opinion. 2 U.S.C. § 437f(c).

[37] *In re Carter-Mondale Reelection Committee, Inc.*, 624 F.2d 538 (D.C. Cir. 1980); *Federal Election Commission* v. *Americans for Change*, 429 F.Supp. 738 (D.D.C. 1980) (three-judge court), *appeal docketed*, No. 80-1067 (December 29, 1980).

[38] The advisory opinions discussed by appellants are not inconsistent, but illustrate that a determination of whether particular activity is a solicitation for contributions is a

NLRB v. *Dayton Tire & Rubber Co.*, 503 F.2d 759, 764 (1974); *NLRB* v. *Deaton, Inc.*, 502 F. 2d 1221, 1228 (5th Cir.), *cert. denied*, 422 U.S. 1047 (1975). However, as observed in the very decision upon which appellants rely, there is no reason why this Court should hold that "Congress may not delegate to the FEC—as it has to the NLRB—the task of deciding in the first instance what should be permitted and what

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factual matter. Indeed, if anything, the AO's cited by appellants demonstrate that the Commission's interpretation and application of the term solicitation is consistent with the common understanding of the term. *See* Stein, Jess. Ed., *The Random House Dictionary of the English Language*, the Unabridged Edition, Random House (N.Y. 1973). The Commission has found actions to be solicitations where they are designed to encourage nonsolicitable individuals to contribute to a trade association's separate political fund, and has found actions reasonably designed only to inform individuals of the existence of the political fund not to be solicitations. Thus, the Commission has determined that a trade association may invite members to a cocktail party to solicit contributions from their stockholders or executive or administrative personnel, with the prior approval of its member corporations, AO 1976-27, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5213; a trade association may operate a fundraising booth at the association's convention, if it takes steps to ensure that only permissible solicitees make contributions, AO 1978-17, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5307; and a trade association's separate segregated fund may operate a booth at the association's convention to seek authorizations from member corporations to solicit their executive employees, and to accept authorized contributions, AO 1978-83, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5382. On the other hand, the Commission has determined that it is a prohibited solicitation when a trade association includes in its newsletter, sent to a large number of nonsolicitable employees, an article which advocates the PAC activities and encourages employee participation in the PAC's success, AO 1979-13, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5403. *See also* AO 1976-96, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5227; AO 1981-41 (October 20, 1981).

forbidden" under FECA. *Martin Tractor*, 627 F. 2d at 387, *citing NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 620 (1969).

CONCLUSION

This Court should dismiss this case as an improper appeal under § 437h. Should the Court determine that it has jurisdiction under § 437h, it should affirm the judgment of the court of appeals in full.

Respectfully submitted,

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BREAD POLITICAL ACTION COMMITTEE, NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION, LUMBER DEALERS POLITICAL ACTION COMMITTEE, NATIONAL RESTAURANT ASSOCIATION, and the RESTAURATEURS POLITICAL ACTION COMMITTEE,
Appellants,

vs.

THE FEDERAL ELECTION COMMISSION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OCTOBER TERM, 1981

No. 80-1481

BREAD POLITICAL ACTION COMMITTEE, NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION, LUMBER DEALERS POLITICAL ACTION COMMITTEE, NATIONAL RESTAURANT ASSOCIATION and the RESTAURATEURS POLITICAL ACTION COMMITTEE,

Appellants,

v.

THE FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR APPELLANTS

ARGUMENT

INTRODUCTION

The overriding concern behind the Federal Election Campaign Act was the problem of corruption of elected representatives through the creation of political debts resulting from lavish financial contributions. Equally important, however, was the goal of preservation of the individual citizen's confidence and participation in government. Indeed, the Act's "underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States* v. *Auto Workers*, 352 U.S. 567, 575, 590 (1957) (*See also* App. Br. at 28).

As we have shown in our opening brief, the restraints imposed by §(D) not only undermine these goals but disserve the First Amendment. Absent §(D), there will be a freer flow of political information and enhanced involvement in the political affairs of the Nation by a substantial segment of our people. For no longer will the right of political association be dependent upon the arbitrary, censorial decisions of corporations—the very entities which supposedly have had so pernicious an influence on the electoral process. Instead, those decisions will emanate, as the First Amendment intended, from the mind and conscience of the individual. *Abood* v. *Bd. of Education*, 431 U.S. 209, 234-35 (1977).

Counterpoised against the palpable harm which has and will continue to result if §(D) is sustained, is the absence, if it is invalidated, of any injury to the goals which are subserved by the Act. As we have shown, and as we shall further explain below, a declaration of unconstitutionality will not harm in the slightest the statutory machinery. Unimpaired will be the contribution limitations, the disclosure and reporting requirements, the anti-proliferation rules, the criminal and civil sanctions and all of the other provi-

sions which contribute in a meaningful and necessary way to the overall functioning of the Act.

The FEC has met the force of these and the other arguments in our opening brief by ignoring them. And instead of subjecting the Act to the exacting scrutiny mandated by the First Amendment, it has succumbed to that mode of thought whereby phrases are made to do service for critical analysis by being turned into dogma. *Pennekamp* v. *Florida*, 328 U.S. 331, 352 (1946) (Frankfurter, J., concurring). Indeed, for the FEC, resolution of this case requires only the undiscerning repetition of the shibboleth, "electoral integrity"—that single supreme simplicity to which all other values are subordinated.

In what follows, we shall further demonstrate the pervasively flawed bases upon which rest the Commission's contentions and those of the majority below.

I.

Relying on a hyper-literal parsing of the supposedly "precise terms" of §437h,[1] the FEC contends that Congress has limited the availability of §437h to the three classes of expressly enumerated individuals and entities (i.e., the FEC, individual voters, and the national committee of a political party). (Gov. Br. at 12). Not surprisingly, no attempt is made to explain how this restrictive construction can be harmonized with the expansive construction accorded §437h by *Buckley* v. *Valeo*, 424 U.S. 1 (1976). (*See* App. Br. at 13-14).

Buckley is not explicable on the basis that among the plaintiffs were individuals eligible to vote. (Gov. Br. at 16). Indeed, as demonstrated in our opening brief, a careful reading of that case demonstrates that their presence was irrelevant to the Court's construction of §437h. (*See*

[1] *But see*, Citizens and Southern National Bank v. Bougas, 434 U.S. 34, 45 (1977) (referring to "the inexactitude of Congressional language" in FECA).

App. Br. at 13-14). Additionally, *Buckley* "makes it clear that organizations may have standing under §437h if they otherwise meet the requirements for 'associational standing.'" *BreadPAC* v. *FEC*, 591 F.2d 29, 36 (7th Cir. 1979), *aff'd en banc*, 635 F.2d 621 (7th Cir. 1980). As the Seventh Circuit recognized, precisely the same situation obtains in the instant case as was present in *Buckley*, for the record makes clear that the appellants have individual members, and that the test for associational standing has been satisfied. *See* 591 F.2d at 36.[2]

In the last analysis, the FEC's cramped and labored construction of §437h is bottomed on the contention that the rights established by the Act can only be vindicated by the expressly enumerated parties since only they truly represent the "public interest [rather than] their own interest in maximizing their political influence." (Gov. Br. at 12-13).[3] At least three flaws are manifest in this reasoning.

First, just as purely private litigation under the antitrust laws is in the public interest,[4] so too is quasi-private litigation having as its end a determination of the constitutionality of the Act. Second, an expansive construction of §437h will not diminish the role of the FEC in litigation under the Act. It will do no more than cast the Commission in the role of defendant rather than plaintiff. Surely, the public interest cannot be said to depend upon procedural positioning.

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[2] BreadPAC, RPAC, and LudPAC, which are "separate, distinct legal entities", CMA v. FEC, ___ U.S. ___ (1981), 69 L.Ed.2d at 581, and n.17, are composed *entirely* of individual members.

[3] This contention is demonstrably false, for the interests of the national committee of a political party are obviously in "maximizing [its] political influence" rather than advancing some abstract notion of public interest.

[4] *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 340 (1971); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

Third, it is illogical to suggest that the public interest in a determination of the constitutionality, *vel non*, of basic provisions of the Act is greater if obtained by one of the parties enumerated in §437h. It is the rapid and certain determination of constitutional questions by this Court, *simpliciter*, that serves the public weal; the identity of the plaintiff neither enhances nor diminishes the value of that determination.

Acceptance of the FEC's suggestion that constitutional challenges should be raised defensively in enforcement proceedings under §437g (Gov. Br. at 13) would not be in the public interest. Fearing the imposition of the Act's civil and criminal sanctions, citizens, both individual and corporate, will avoid engaging in speech and conduct which might even remotely be suspect by the FEC. *Cf.*, *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785 n.21 (1978). This avoidance, of course, precludes the possibility of the very enforcement proceeding in which the constitutional issue could be raised. In short, relegating constitutional challenges to the limbo of enforcement proceedings would chill First Amendment activity while the FEC intentionally remained inert, thereby avoiding a judicial determination of questionable provisions of FECA.

Finally, as previously demonstrated, relegating constitutional challenges to general federal question jurisdiction is itself antithetical to the public interest. (*See* App. Br. at 15-16).

II.

In our opening brief, we demonstrated that the provision of §(D) which makes solicitation dependent upon receipt of advance permission from the corporate employer has created a system of prior restraint indistinguishable in its censoring effect on speech and associational freedoms from the licensing systems consistently invalidated by this and other courts. (See App. Br. at 16-29). Perhaps recognizing its inability to overcome the presumption of unconstitutionality borne by any system of prior restraint

(*id.* at 27), the FEC makes the desperate claim that the regime of censorship created by §(D) does not constitute a prior restraint because it is accomplished by a private corporation rather than an administrative official. (Gov. Br. at 30). This contention ignores the reality that §(D) does not merely passively allow, but rather explicitly and affirmatively mandates, corporate censorship.

In addition, it is contrary to every case which has ever considered a problem with comparable dimensions. Illustrative is *ACLU* v. *Jennings*, 366 F.Supp. 1041 (D. D.C. 1973) (3 judge court), *appeal dismissed as moot*, 422 U.S. 1030 (1975). There, the ACLU sought to enjoin enforcement. Title I of the Federal Election Campaign Act of 1971, which required that any person desirous of publishing an advertisement either "on behalf" or in "derogation of" a candidate had first to obtain certain certifications from the candidate. Without such a certification, a newspaper could not lawfully publish the advertisement. In holding Title I to be violative of the First Amendment, the court underscored the impermissible nature of the prior restraint imposed by the Act. There, as here, the Congress had, in effect, delegated censorial powers to *private* corporate and individual citizens. That fact was deemed of no significance, for the censorship stemmed from the compulsion of the statute. *Id.* at 1049.

Also instructive is *NAACP* v. *Alabama*, 357 U.S. 449 (1958), which rejected the argument that the consequences of disclosure of the NAACP's membership were not the result of state action, but of private prejudices:

> "It is not sufficient to answer, as the state does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for its only after the initial exertion of state power represented

by the production order that private action takes hold." Id. at 463 (Emphasis in original).[5]

The most glaring deficiency in the FEC's presentation is the absence of any attempt to explain how the prior permission rule furthers the goals of eliminating corruption and preserving the confidence of our people in government. (App. Br. at 31-42). There are, of course, vague allusions to the importance of electoral integrity, coupled with a plea for judicial deference to the means chosen by Congress. (Gov. Br. at 25, n.23). However, as *Buckley* and *ACLU* v. *Jennings* teach, that interest can neither be invoked as a talismanic incantation to support any exercise of power (App. Br. at 30, n.42),[6] nor as a basis for relaxation of the rigorous standard of review required by the First Amendment.[7]

Any rational assessment of the interests implicated by the Act reveals that they "are not served at all, or in other than a random manner, by the prohibition in §[D]." *Belotti, supra,* 435 U.S. at 788. In addition, such an assessment ineluctably leads to the firm conclusion that, in its operative effect, the prior permission rule has subjected the First Amendment rights of vast numbers of our people to the "arbitrary discretion", (*Nixon* v. *GSA,* App. Br. at 25, n.34) of their corporate employers. This broad-based apparatus of censorship disserves the First Amendment by "indiscriminate[ly] interfer[ing]" with freedom of association, *Abood, supra,* 431 U.S. at 234, n.30, and sub-

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[5] *Cf.*, Smith v. California, 361 U.S. 147, 154 (1959); Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976); Rowan v. Post Office, 397 U.S. 728, 741 (1974) (Brennan J., concurring); Marsh v. Alabama, 326 U.S. 501, 506-09 (1946).

[6] *Cf., Bellotti, supra,* 435 U.S. at 788; Lefkowitz v. Cunningham, 431 U.S. 801, 808 (1977); *Abood, supra.*

[7] The exacting scrutiny required in First Amendment cases is not pretermitted even where there are explicit legislative findings. *See* Landmark Communications Inc. v. Virginia, 435 U.S. 829, 843-44 (1978); United States v. CIO, 335 U.S. 106, 139-40 (1948) (Rutledge, J., concurring).

verts the Act's underlying purposes. (App. Br. at 16-29; 31-32; 37-43).[8]

III.

A.

Rather than responding in any principled way to the arguments in Part III of our opening brief, the FEC underscores the fact that §(D) allows the appellants to engage in a variety of political activity unrelated to political solicitation. (Gov. Br. at 20-21; 26-27). However, as shown in our opening brief, the First Amendment will not brook significant restraints on political solicitation merely because restrictions are *not* imposed on other separate, distinct forms of protected activity. (App. Br. at 19-23).[9]

Moreover, even if the argument had some validity as applied to appellant-*trade associations*, it can have no pertinence as applied to the appellant-*political committees* which are separate jural entities that in the main exist only for the purpose of making political solicitations and contributions. Nor is the FEC's partial paralysis argu-

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[8] The suggestion that §(D) "does not provide for any form of prior censorship of First Amendment activity" because "corporations could exercise the same power simply by not joining a trade association" (Gov. Br. at 30-31) overlooks the fact that a corporation's decision whether to join a trade association is a business determination free of any governmental compulsion. That a negative decision would place the corporation's executives outside the class of permissible solicitees, *as defined by §(D)*, is simply the incidental effect of that purely private decision. A very different situation is presented when the corporation is invested by statute with absolute, unreviewable, arbitrary power to determine whether its employees can receive political information (*See* App. Br. at 26-28).

[9] *Compare* Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) (prohibition against inserts in utility bills held unconstitutional even though there clearly were alternative avenues available to inform customers); Illinois State Bd. of Election v. Socialist Workers, 440 U.S. 173, 184 (1979) (ballot restrictions affect associational freedoms and may be unconstitutional even though other aspects of right of political association are unaffected).

ment sufficiently sensitive to the fact that §(D)'s restraints affect the fundamental right of potential contributors to receive information about candidates[10] and thereafter to exercise the right of political association through the medium of a political committee. (*See* App. Br. at 20-22).[11]

B.

Relying on the *a priori* conclusion of the majority below, the FEC ominously warns that without the single solicitation rule of §(D)[12] there would be a "'proliferation of trade associations and solicitations which would, in turn, undermine the very purpose of the Act's restrictions on the use of corporate treasuries in federal elections.'" (Gov. Br. at 25-26).

These result-oriented, hypothetical, "after-the-fact rationalizations", *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 653 (1974) (Powell, J., concurring), are unacceptable since they find no support either in the legislative history of the 1976 Amendments or in any critical and

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[10] The Solicitor General recently acknowledged that in the hierarchy of First Amendment rights, the right of the public to receive such information is "supreme". Brief for the United States in CBS v. FCC, No. 80-207 at 60. *See also Buckley, supra*, 424 U.S. at 14-15. For the reasons advanced at pages 19-23 of our opening brief and in *Citizens Against Rent Control* v. *Berkley*, ___ U.S. ___ (1981), 50 L.W. 4073, §(D)'s abridgements cannot be dismissed as insignificant merely because they have not completely emasculated the First Amendment rights of potential contributors.

[11] Illustrative is the incredible claim that §(D) does not affect individual rights at all. (Gov. Br. at 10; 29). This contention blinks reality and is contrary to the district court's unchallenged Findings of Fact. (*See* App. Br. at 2-5; 20-22; 29; 635 F.2d at 639 (dissenting opinion)).

[12] Section (D) is comprised of two distinct restraints: the prior permission rule and the single solicitation rule, which prohibits solicitation by more than one trade association in any year even though, as here (Findings 76; 181), the trade associations are autonomous and have non-identical goals and memberships.

discerning analysis of the ultimate purposes of the Act.[13] The legislative history of the 1976 Amendments reveals that they were passed "without adequate hearings", 122 Cong. Rec. S.6292 (March 16, 1976) (Remarks of Senator Griffin), and in extraordinary haste in order to satisfy the time pressures imposed by the *Buckley* decision. (Id. at 6692-93; 6701; 6703) (Remarks of Senators Cannon, Hatfield and Griffin).[14] Moreover, the Congress' central focus was on the reconstruction of the FEC. Consequently, the restraints of §(D) were never discussed or analyzed. Indeed, while there was an isolated reference to the *existence* of §(D) in the Senate debates, (*id.* at 6700), there was no discussion about the purposes of or justifications for its dual restraints.[15]

In marked contrast to the inattention given to §(D) is Congress' careful consideration of the "anti-proliferation" provisions, which were designed neither to prevent solicitations nor the growth of trade associations. Rather, they were expressly intended to prevent evasion of the contribution limitations by unions, corporations, individuals and groups "by curtailing the vertical proliferation of political committee *contributions*, by providing that all contributions made by a PAC established, controlled, financed, or maintained by any person or group of persons shall be considered to have been made by a single political committee." 122 Cong. Rec. S.6694 (Emphasis supplied). *See also* App.

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[13] In both the First Amendment and equal protection contexts, this Court has repeatedly refused to sanction post-hoc, speculative theorizing when an examination of the legislative context and purpose belies the asserted purpose. *See Bellotti, supra* 435 U.S. at 792-93; Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975); Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976).

[14] *See, generally,* 90 Stat. 1503.

[15] Section (D) was not even in the Senate version of the bill. *See* 122 Cong. Rec. S.6700. It is thus demonstrably false to suggest that §(D) is an integral part of a carefully thought out, delicately balanced legislative scheme.

Br. at 40.[16] Surely "[i]t is incredible that after conspicuous mention of the [anti-proliferation provisions] in the first place at the beginning of [§441a], Congress should have intended to smuggle in a [second section which serves "*a similar purpose*"[17]] by muffled words at the end [of §441b]." *Davis* v. *Pringle*, 268 U.S. 315, 318 (1925) (Holmes, J.).

In sum, the single solicitation rule cannot be sustained as a valid loophole closing device since, by virtue of the anti-proliferation provisions (§441a(a)(5)), there is no loophole left to close. Rather, as the FEC has elsewhere conceded, §(D) constitutes a purposeful attempt to limit the fundraising potential of trade associations (App. Br. at 32). Yet, as we have shown, such a purpose cannot withstand constitutional scrutiny. (*Id.* at 47).

The majority's attempt to justify §(D) on the ground that it serves to prevent "a proliferation of . . . solicitations" overlooks the fact that it is not the solicitation of contributions, but the making of lavish contributions which poses the threat to the integrity of the election process. *See National Right To Work Committee* v. *FEC*, ... F.2d ..... (D.C. Cir.) (Slip Op. 80-1487 at 8, September 4, 1981). It is for this reason that the Act does not restrict either the number of solicitations or the amount of money which PACs can aggregate. Indeed, it was precisely because the Act accorded the opportunity for unimpeded solicitations that this Court in *Buckley* validated its contribution limitations. (App. Br. at 31). Thus, properly viewed, the single solicitation rule prevents the very thing which *Buckley* found justified the restrictions on the First Amendment right to make political contributions. We fail

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[16] In discussing the import of the anti-proliferation provisions, Senator Cannon stressed that contributions from a trade association and the PACs of its corporate members would *not* be aggregated for purposes of the contribution limits. 122 Cong. Rec. S.6694.

[17] Gov. Br. at 24 (Emphasis supplied).

to perceive how such an irrational consequence furthers any compelling interest.

Apart from the analytical deficiencies discussed above, the majority's argument is persuasive only if it rationally could be supposed that, absent the single solicitation rule, a substantial number of corporations would, in fact, be willing to fraudulently proliferate "dummy" associations (635 F.2d at 640) in order to evade the effects of the anti-proliferation rules.[18] For it is fundamental that the First Amendment will tolerate no restraints predicated upon conjecture or refined speculation that untoward consequences might result. (*See* App. Br. at 27, n.40).[19]

This willingness, of course, depends upon whether the risks are exceeded by the benefits. The risks in making contributions through the vehicle of a "dummy" trade association are glaringly apparent. Since the purpose of the creation of such an alter-ego is to evade the Act's contribution limitations, contributions by the controlled association PAC presumably would violate §441a. Additionally, to screen the conspirators' illicit scheme, false reports necessarily would have to be filed with the FEC, thereby violating the Act's reporting and disclosure provisions, and its prohibition against the use of nominees (*see* App. Br. at 40-41), as well as 18 U.S.C. §§371 (conspiracy); 1001 (false statements to a federal agency); and 1341 (mail fraud). Those responsible for the fraud would face

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[18] The circumvention postulated by the majority could only occur with the active connivance of a number of corporations willing to expend substantial sums of money to create a facade of legitimacy and willing to risk the awesome criminal penalties which could be imposed if the fraudulent enterprise were detected. For, as the minority conclusively demonstrated, absent a pervasive conspiracy, no single corporation could exercise a sufficient degree of dominance over a trade association's affairs. 635 F.2d at 640.

[19] *See also Consolidated Edison, supra*, 447 U.S. at 543 ("Mere speculation of harm does not constitute a compelling state interest.").

staggering jail terms and fines under Title 18 and under the Act's criminal provisions. (§441j).

Counterpoised against the obvious and crushing risks would be exceedingly speculative and limited benefits. The conspirators' ability to make illegal contributions through the "dummy" trade association PAC would depend upon "illicit" solicitations having generated sufficient revenues and on the unlikely concurrence among the co-conspirators regarding the identity of the potential recipient of the contribution. Given the uncertainty of any fundraising effort, coupled with the fact that the controlled PAC would be competing with other trade association PACs for funds *see, e.g.*, Finding 148, from the same fixed pool of solicitees, it could not be said with even a reasonable degree of certainty that enough money could ever be raised to make the enterprise worthwhile. When to the balance are added competitive internal solicitations by the corporate conspirators own PACs *and* the biannual union solicitations allowed by §441b(b)(4)(B), the prospects become even more dismal.[20]

In short, it is quixotic to suggest that the uncertain benefits which might be derived from the creation of a "dummy" trade association would motivate corporations to engage in the broad-based criminal conspiracy implicit in the majority's inordinantly speculative thesis.[21] And it would be naive to believe that corporations willing to proliferate trade associations to evade the Act's contribu-

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[20] If the corporate conspirators do not have PACs of their own, the chances of success are thus not reduced, *pro tanto*. However, in that event, it is luminously clear that a corporation would rather create its own PAC and engage in *lawful* solicitation than create a fraudulent PAC with the uncertainty of success and the potential for disastrous consequences in the event of discovery.

[21] In other contexts, this Court has refused to base rules and doctrine on such speculative assumptions. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 351 (1974).

tion limits would flinch at disobeying the single solicitation rule. *Compare Buckley, supra*, 424 U.S. at 45 (easily evaded expenditure limitations which impose restraints on First Amendment rights serve no societal interest).

Finally, as we have shown in our opening brief (pp. 40-41), in light of the elaborate mechanism set up by the Act to insure compliance with its contribution limitations, the single solicitation rule of §(D) *needlessly* imposes direct and immediate restraints on the appellants' First Amendment rights and on the speech and associational rights of potential contributors, without helping to effectuate the Act's contribution limitations. That being the case, it is violative of the First Amendment. (App. Br. at 30, n.42; 40-41; *Citizens Against Rent Control, supra*, 50 L.W. at 4073) (contribution limitations rendered unnecessary by other provisions of the statute).

C.

The dominant theme in the FEC's brief is that since Congress, in §441b(b)(2)(C), has accorded a statutory benefit to corporations by allowing them to use their funds to defer the administrative costs of PAC solicitation—a benefit to which the FEC claims they are not constitutionally entitled—it can condition the exercise of that benefit by the kinds of restraints in §(D). (Gov. Br. at 29-32). We have previously demonstrated that this argument is not supported by a single pronouncement of this or any other Court, and that it is contrary to the official interpretation of the Department of Justice as reflected in the formal Opinion Letter of Assistant Attorney General Thornburg. (App. Br. at 33-36),[22] which "is entitled

[22] The letter was issued to the FEC in connection with the Sun Oil Advisory Opinion 1975-23. The FEC's present claim that the affinity of interest standard was "specifically rejected" by Congress is erroneous. (Gov. Br. at 31, n.31). A reading of Senator Cannon's remarks and the debates on the 1976 Amendments makes clear that that standard was never discussed or debated as an option to the categories of permissible solicitees set forth in the Act. *See* 122 Cong. Rec. S.6694.

. . . to great weight. . . ." *Pipefitters* v. *United States*, *supra*, 407 U.S. at 409.[23]

This Court's prior decisions, as well as the debates on the Hansen Amendment, reflect that the evil at which the general prohibition against union and corporate *expenditures* was directed was the use of treasury funds *to influence the general public to vote for or against a particular candidate. See United States* v. *CIO*, 335 U.S. 106, 116, 121 (1948); *United States* v. *Auto Workers*, *supra*, 352 U.S. at 584-85, 587, 589, 592; *Pipefitters*, *supra*, 407 U.S. at 430-31. Since the solicitation of the stockholders and the executive and administrative personnel of a trade association's corporate members (and others having an affinity of interest, *see* App. Br. at 23, n.29; 35-36) neither serves that purpose nor is directed to the public at large, but solely to the only natural "constituents" a trade association can have, *Pipefitters*, *supra*, at 431, n.42, there can be no persuasive claim that such benign political activity, lying as it does at the core of the First Amendment,[24] can be constitutionally burdened by the restraints imposed by §(D).

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[23] The statements at page 31, n.31 of the FEC's brief are unpardonably false. As *Pipefitters* makes clear, the Hays' remarks were directed to the *unofficial* comments of some unspecified "Associate Deputy Attorney General" contained in a newspaper article. 407 U.S. at 424-25 and *id.* at nn. 38 and 39. *Moreover, Representative Hays could not have been referring to the Thornburg opinion letter since his comments antedated that letter by almost four years!*

[24] *See* App. Br. at 19, n.24, 24, n.32; Abood, *supra*, 431 U.S. at 234; Broderick v. Oklahoma, 413 U.S. 606, 616 (1973).

[25] The former General Counsel of the FEC has concluded that it is doubtful that the restraints on trade association solicitation can survive constitutional scrutiny. *See* J. Murphy, *The Impact of First National Bank* v. *Bellotti*, in The Corporation In Politics 55 (Practicing Law *Institute* 1979).

Nor does such solicitation pose a threat to the evil sought to be eradicated by the general prohibition against corporate and union *contributions*, namely the problem of actual or apparent corruption of elected representatives resulting from lavish financial contributions. Thus, the restraints of §(D) cannot be justified on this basis. Finally, even if all we have said is inaccurate and the Congress has the right to prohibit corporate expenditures to defray a PAC's solicitation costs, it does not follow that where that right is accorded by statute, its exercise may be conditioned by the kinds of otherwise unconstitutional and unnecessary conditions imposed by §(D)[26]

D.

The decisions of this Court make clear that substantial restraints on political solicitations and contributions implicate fundamental First Amendment rights and thus are subject to exacting judicial review. *See Citizens Against Rent Control, supra,* 50 L.W. at 4072; *Abood, supra,* 431 U.S. at 234-35. That review requires that before the restraints can withstand constitutional challenge, it must be shown that: the inhibitions on expressional and associational freedoms are truly necessary to further the goal of electoral integrity; that absent the curtailment of First Amendment rights, harm will certainly result; that the means employed are the least restrictive of associational freedoms; and that the benefits gained outweigh the harm to constitutionally protected rights. (App. Br. at 30, n. 42).[27] As the discussion in our opening brief demonstrates, §(D) fails to satisfy any of these criteria. *Id.* at 31-43.

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[26] *Cf.*, Frost Trucking Company v. Railroad Commission, 271 U.S. 577 (1925); Williams v. Rhodes, 393 U.S. 1, 28 (1968); *Bellotti, supra,* 435 U.S. at 798, n.14; *Elrod* v. *Burns,* 427 U.S. 347, 360-62 (1976); *Vitek* v. *Jones,* 445 U.S. 480, 488 (1980).

[27] The FEC seems to concede the applicability of these criteria. (Gov. Br. at 26).

Nothing in the plurality opinion in *CMA* v. *FEC*, *supra*, supports an argument for diminished judicial review in this case. Unlike the substantial restrictions created by §(D), the restrictions in *CMA* were marginal since they permitted at least the symbolic expression of support evidenced by a contribution. Here, the intended and inevitable effect of §(D) is to directly interdict solicitations thereby preventing the making of contributions and thus precluding even the symbolic expression of support evidenced by the act of contributing. And by preventing the contribution, §(D) interdicts the very act which serves to affiliate the contributor with the PAC and other like-minded persons. (*See* App. Br. at 31-32; 47).

IV.

Reduced to its essentials, the FEC's response to the arguments in Part IV of our brief consists of a reiteration of the majority's holding that §(D) benefits rather than disadvantages trade associations. (Gov. Br. at 35).[28] For the reasons set forth in our opening brief, this contention is specious and at war with *Buckley's* recognition

[28] This contention is based on the FEC's dissection of the various subparts of §441b(b)(4) into its purportedly prohibitive and permissive components. (Gov. Br. at 35, n.33). The difficulty with this highly artificial mode of analysis is that it overlooks the inextricable concatenation between the various subparts of §441b(b), and it ignores the FEC's admission, as revealed by its acquiescence in certain findings of fact which were jointly submitted by it and the appellants to the district court, that §(D) is indeed restrictive. *See* Findings 140; 144. Moreover, this claim is belied by the district court's findings, by reality, and by the FEC's own Advisory Opinions. (See App. Br. at 3, n.8; 29; 32, n.44). Prior to §(D), appellants' solicitation activities were not circumscribed by the throttling restraints of §(D). (App. Br. at 2-3). It is thus absurd to suggest that their imposition, with all their devitalizing effects (App. Br. at 3-4; 29), has conferred a "benefit" on trade associations.

that even when a statute appears to be evenhanded, the appearance of fairness may not reflect political reality, as well as with the fundamental precept that realities must dominate judgment. (App. Br. at 43; 45).[29]

CMA v. *FEC*, *supra*, does not support the FEC's argument that §(D) is not invidiously discriminatory. In *CMA*, the plurality compared the restrictions placed on individuals and unincorporated associations, on the one hand, with those imposed on unions and corporations on the other. The plurality found that overall the Act imposed fewer restrictions on the former than on the latter. However, the plurality did not pretend to decide whether the restrictions imposed on unions and corporations on the one hand were comparable to those imposed on corporate trade associations on the other.

The only other aspects of the FEC's argument that merit a response are the claims that i) §(D) does not violate the due process clause since there is no "purposeful discrimination" and ii) that any disparity in treatment is rationally based. (Gov. Br. at 35, n.33; 38). We need not dwell long on either of these contentions.

The cases cited in support of the first argument all involved claims of racial discrimination. In that context, this Court has indeed required a showing of "purposeful discrimination." While such a showing is not a prerequisite in other equal protection cases, *see* Tribe, *supra*, 991, *et seq*, in any event it is satisfied here. (App. Br. at 32, n.44).

Contrary to the FEC's veiled suggestion, in cases implicating core First Amendment values, it is not enough to satisfy the *minimal* test of reasonableness.

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[29] *See also* Anderson v. Martin, 375 U.S. 399, 402-03 (1964); Griffin v. Illinois, 351 U.S. 12, 23 (1955) (Frankfurter, J., concurring) ("Law addresses itself to actualities."); L. Tribe, American Constitutional Law 1203 (1978).

Rather, the disparity in treatment must withstand the exacting scrutiny applicable in First Amendment cases. (*See* App. Br. at 48, n.53). Since, as we have shown, the restraints of §(D) fail to satisfy the criteria applicable in such cases, and since no restraints comparable to those in §(D) are imposed upon corporations and unions (Finding 201), it must be concluded that §(D) invidiously discriminates against trade associations in violation of the due process clause of the Fifth Amendment.

V.

Where the term "solicitation" has been used in a statute without being explicitly defined, it has almost always been accorded its dictionary definition (i.e., a request, petition, entreaty). (*See* App. Br. at 48). *Significantly, however, the FEC does not say, because it cannot, that as used in §(D), "solicitation" was intended to have such an explicit and narrow definition*! On the contrary, it is clear that in §(D) Congress has disavowed the dictionary definition in favor of an oceanic concept that defines solicitation as "any action that could fairly be considered a request for a contribution." (*See* App. Br. at 48-49). This definition is flawed since it does not allow men of common intelligence to ascertain in advance what is forbidden, and it necessarily " 'puts the speaker wholly at the mercy of the varied understanding of his hearers' . . . ." (App. Br. at 48).[30]

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[30] The authorities relied on by the FEC (Gov. Br. at 38, n.34) do not support a contrary conclusion. Neither *Ohralik* v. *The Bar Ass'n*, 436 U.S. 447 (1978) nor *In Re Primus*, 436 U.S. 412 (1978) involved questions of statutory vagueness. In fact, the disciplinary rules involved in those cases did not use the term "solicitation", but rather spelled out in words the conduct which was prohibited. *See* 436 U.S. at 418, n.10; 436 U.S. at 453. It was this Court which employed the term "solicitation" to describe the petitioners' activities. *Broderick* v. *Oklahoma*, 413 U.S. 601 (1973) involved

(footnote continued)

The FEC's contention that §(D) is not vague because of the existence of the Advisory Opinion mechanism (Gov. Br. at 39-40) evades rather than answers the question presented here. While in some cases the harm to First Amendment values inevitably flowing from vague laws can be mitigated by the promulgation of a comprehensive body of principled administrative decisions designed to narrow and sharpen an objectionable statute, it is the body of decisions, not the mere existence of an advisory opinion mechanism, which is significant. In the context of this case, the advisory opinions have done nothing to alleviate the pervasive vagueness of §(D). Rather, they are episodic determinations which give no guidance beyond their immediate factual situations; they neither "shed much light on the Commission's interpretation of 'solicitation' activities", nor have they "much illuminated the meaning of 'solicit' . . ." *Martin Tractor* v. *FEC*, 627 F.2d 376, 390 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980).

In conclusion, we can think of no better denunciation of §(D) than that unwittingly offered by the FEC. After stating the test for vagueness, the Commission said: "The term 'solicit' as used in FECA *falls far short* of this standard." (Gov. Br. at 38) (Emphasis supplied). We respectfully agree.

(footnote continued)
a statute which prohibited, *inter alia*, certain political solicitations. The petitioner's vagueness argument and this Court's focus were *not* directed toward the word "solicitation", but rather centered on the ambiguity of the phrase "for any political organization, candidacy or other political purposes." *See id.* at 608. That *Broderick* does not stand for the proposition that "solicitation" statutes are *per se* constitutional is illustrated by *Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976), which invalidated on vagueness grounds an ordinance prohibiting charitable and political solicitations without notice to the police.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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